IN THE UNITED STATES DISTRICT COURT

IN AND FOR THE DISTRICT OF DELAWARE

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MOBILEMEDIA IDEAS LLC,	:	CIVIL ACTION
Plaintiff,	:	
vs.	:	
APPLE INC.,	:	
Defendant.	:	NO. 10-00258-SLR-MPT

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Wilmington, Delaware
Friday, July 27, 2012
9:40 o'clock, a.m.

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BEFORE: HONORABLE SUE L. ROBINSON, U.S.D.C.J.

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APPEARANCES:

MORRIS, NICHOLS, ARSHT & TUNNELL
BY: JACK B. BLUMENFELD, ESQ.

-and-

Valerie J. Gunning
Official Court Reporter

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P R O C E E D I N G S

(Proceedings commenced in the courtroom beginning at 9:40 a.m.)

THE COURT: You may be seated. And I apologize for being late. There was a retirement breakfast for our Chief Probation Officer and you think that two hours is plenty of time and the Governor shows up unexpectedly and, you know, letters from the Vice President. We have all sorts of things going on. But in any event, I apologize for running late, and I look forward to our getting started.

Why don't we make some introductions and any preliminary remarks you care to and then we'll get down to business. Mr. Blumenfeld?

MR. BLUMENFELD: Thank you, your Honor.

Jack Blumenfeld for the plaintiff, MobileMedia ideas, and with me at counsel table are Steve Bauer, Justin Daniels, Safraz Ishmael, and behind them, Jinnie Reed, all from the Proskauer firm. And in the back, the general counsel of MobileMedia is Tony Petrowskey.

THE COURT: Hi. Welcome all. Thank you very much.

Mr. Herrmann?

MR. HERRMANN: Good morning, your Honor.

THE COURT: Good morning.

MR. HERRMANN: Your Honor, I'd like to introduce George Riley from O'Melveny & Myers, and Mr. Myers will introduce the rest of the Apple team.

THE COURT: Okay. Good enough.

MR. RILEY: Good morning, your Honor.

THE COURT: Good morning.

MR. RILEY: I'd like to introduce first my client from Apple, Ian Cunningham, from the in-house counsel. Wendy Annaherby, also from the in-house counsel. And then my colleague from O'Melveny & Myers, Luann Simmons, and my colleague from O'Melveny, John Crawford.

THE COURT: Good morning.

MR. RILEY: And across the bar, my colleague Melody Drummond Hanson.

THE COURT: Thank you very much.

I know you had submitted to me a proposed agenda and I had added a little bit to that because there are a couple outstanding matters that I thought could, I could use some recent guidance on. You all write, but somehow sometimes I think it's easier to talk about what's happening in the case.

So if you wouldn't mind starting with the motion to dismiss. And the cases as you read them all talk about

bundles of rights, and with the information we've gotten in the record, it's really unclear to me how those bundles, how that bundle of rights is really divided among the plaintiff and its owners, basically.

So it would be helpful to me if I could have a few words from plaintiff's counsel initially, and then I will hear from a response from Apple in terms of whether, in fact, MMI has retained a sufficient bundle of rights to be able to be pursuing this patent litigation without joinder of any of its owners.

MR. BAUER: Thank you, your Honor. Steve Bauer.

So your Honor, when we start with the bundle of rights, and if I can just put on here the document.

There's a pure perfect patent assignment in this case. It starts with --

THE COURT: And just because we're short of time, I understand that all of these papers were exchanged contemporaneously, so I'm going to assume for purposes of this proceeding that there was a pure assignment.

MR. BAUER: Okay.

THE COURT: But then it seems as though with the rest of the documents, things were taken back, and so that's where I'm confused.

MR. BAUER: Okay. So we have the pure assignment. Nothing was taken back, so MobileMedia was

assigned all of the rights. It granted back to its parents, so it owns all of the rights, period. The patents were transferred, assigned. MobileMedia has the sole and exclusive right to collect royalties going forward, the sole and exclusive right to litigate going forward, the sole and exclusive right to license going forward. In all of the cases of outstanding, that's the primary issue, who has the sole right.

The rights that were granted back were Sony and Nokia retained nonexclusive licenses to their own technology. So Sony and Nokia have no rights to enforce the patents at all, period. They retain nonexclusive rights to license. They are shareholders, non-majority shareholders. Both Sony and Nokia have two seats on the board. They argue as though Sony and Nokia are the same company and that between the two of them, they have a majority, four seats, but each of those are completely independent companies and each of them have two seats on the board.

Those people are not decision-makers in this technology under the contract. Those people cannot be people who have operating responsibility in this field. Sony and Nokia, as shareholders, will retain, get, some profits from this, if there's money to be paid out.

So they are acting, Sony and Nokia, under the agreements, are nothing more than non-majority shareholders

in this entity called MobileMedia. No different -- well, it's a lot less than all of the cases in which there's a holding company, which one person owns everything. There's a lot of case here where the parent creates a subsidiary and puts all the patents in. The Federal Circuit says in those cases, those companies can't even join. When they're the shareholder and they control the board and control everything, they can't join.

In this case, Sony and Nokia are only two seats out of seven, minority shareholders, have a nonexclusive license back. They did retain any licenses they had granted beforehand. They retained the money benefit of those licenses, so both Sony and Nokia have other licenses with other companies. Those licenses, those other licenses stay with them. But they have no right to enforce the patents coming out of those licenses. They have the right to income coming from those other licenses.

So prospectively, when this assignment was made, MobileMedia owns the patents. There was one -- I'm trying to remember all of the issues for your Honor. There was one issue about reversion that after some period of time it would revert. That provision no longer exists. Not because of this lawsuit, although the coincidence, the banks required that to come out before they provided lines of credit. They wanted to know there was no reversion rights.

THE COURT: And does that mean even though I'm supposed to be looking at the fact that the time suit was brought, I shouldn't look at that fact at the time?

MR. BAUER: Your Honor, there are two types of issues of standing. Constitutional standing is on that date of filing. I can't imagine that there's any argument here we didn't have constitutional standing. There was an assignment. Legal title was granted. We owned the patent. And, your Honor, there's not a single case, not a single -- we talk about 12 cases from the Federal Circuit. Not a single case in which there was an assignment in which the Federal Circuit said the party with the assignment didn't have the right to bring the case, not one. So that's the constitutional standing.

The prudential standing goes to the issue of, is there a risk of multiple litigation. And prudential standing is when it can be corrected. They would like it to be corrected by joining the parties. We say it does not need to be corrected. So that issue of reversion is gone.

There was also an issue that the company can terminate in 2020, and what happens then. Well, all that happens under the agreement in 2020 is the parties, the shareholders, the board, can decide what to do. It's not an automatic in 2020, everything goes back. It's just, this is like a venture fund or anything like that. This has a

limited term. In 2020, they've agreed to sit down and talk, to see what will happen next. All of these patents will have been expired by then, so there's no risk to them of multiple lawsuits or anything like that.

But there's nothing automatic. That's what's most important about this. There's nothing -- there are no rights that have been retained by Nokia or Sony that's automatic. They are acting as shareholders. If they both agree in 2020 to terminate and to reallocate the patents, they're free to, but that's no different than any company which owns a patent. Right? I mean, the patent gets assigned, and when the patent gets assigned and the legal title goes with it, the new owner has the right to enforce the patent.

So what's most important, the parties, Nokia and Sony, have no rights to enforce these patents at all. They don't control the litigation. There's nothing in these agreements, so there's a lot of negatives. So I can't point to where it is. They don't approve litigation, Sony and Nokia don't approve litigation. Sony and Nokia don't approve licenses.

There's discussion about, I think it's 18 things that need to be unanimous. None of those 18 things relate to the litigation. Those 18 things are things that relate to the company, such as termination, transfer of assets, you

know, all the financial stuff, and that's all in the agreement, which I can show you, here's the 18 things. None of them, they don't need unanimous consent to litigate, to settle, or anything.

Other things they need two-thirds -- oh, not two-thirds -- majority consent for other things that relate to assets, but not to the settlements of these cases. They're nothing more than shareholders. They get money out of this like any shareholder, but the thing to keep in mind is there's nothing different about this than a patent holding company, where there's a hundred-percent ownership in a company. The difference is, here you have three entities that own it.

THE COURT: And you have not mentioned a third entity.

MR. BAUER: They have not asked to join the third entity, which is MPEG LA.

THE COURT: All right.

MR. BAUER: They're trying to get Sony and Nokia into the case.

THE COURT: All right.

MR. BAUER: MPEG LA -- so they have not asked to join MPEG LA.

THE COURT: Okay.

MR. BAUER: Which is their -- they have three of

the seven seats. But, again, we come back, all of those cases in which there's a -- you know, the Federal Circuit says, a parent can't join the case. A parent which owns all the stock, gets all the benefits, controls the board, can terminate the company on a moment's notice cannot join this case, according to the Federal Circuit. A sole shareholder who owns the company can't join this case. A nonexclusive licensee can't join this case. The Federal Circuit is so clear about that. And here what they're trying to do is get two -- and those are the pure hundred-percent ownerships, and here what you have is two companies that have minority ownership, and I don't know if there's something else. Again, I don't have -- well, let me just --

THE COURT: Well, I think that's fine.

MR. BAUER: But I think they pointed to seven different things, but all of those things are the types of things an owner would get, but not -- an owner of the company would get, but what they don't get to do is manage the litigation.

THE COURT: All right. Thank you very much.

Let's hear briefly from Apple.

MR. RILEY: Thank you.

Your Honor, this motion is founded squarely on a case involving an assignment, the Crown Die case, a 1923 Supreme Court case in which there was an assignment of

rights, and the United States Supreme Court said that wasn't sufficient. And that's what's going on here. And I think this is squarely presented by counsel's last representation to the Court, that Nokia and Sony have nothing to do with the litigation. That is not true.

In the operating agreement, and I'm referring to Bates stamp 0266 and 0267, it sets forth the rights of Sony and Nokia that require unanimous approval by the board. What counsel said was what the members don't get to do is manage the litigation.

In that list of rights that the board has that require unanimous approval is, quote, "Enter into contingent fee arrangements with law firms or other service providers engaged by or for purposes of providing services to the company."

So Nokia or Sony can veto the selection of counsel to bring contingent fee litigation. That's not a traditional role of the Board of Directors. And, in fact, that control even goes beyond that.

In Section -- in the same section of the operating agreement, there's a provision that says, all other matters require the majority approval of the board, such as licensing.

Now, the transfer of a patent requires unanimous approval of the board, but, for example, other actions

require majority. But they carve out an exception, and that exception is that Sony and Nokia together have the exclusive authority to approve the services budget, and the services budget is the budget for litigation and licensing.

So what we have here is very, very clear, is a shell company that was created. Nokia and Sony park their patents there for three years. Now, that provision has been changed, but as the Court points out, we must look at constitutional standing at the time the case was filed, and when the case was filed, Sony and Nokia park their patents for three years, and then they would get them back automatically, unless MMI had reached certain benchmarks. And that reversion right was critical to the Federal Circuit's opinion in the Pro Pat case in which, again, it was a parking situation.

Pro Pat wasn't a license. Pro Pat purported to grant something akin to co-ownership to the transferee. But the Federal Circuit said, no, they can get the patents back. And in Pro Pat, there was a right to veto litigation targets, and the Court said that right had to be exercised in the reasonable discretion of the transferor, but still it was control over the litigation.

Contrast that to our situation. The operating agreement specifically provides that Sony and Nokia owe no fiduciary duties to MMI. It expressly provides that

their company representatives on the board can act in the interest of Sony and Nokia, not in the interest of MMI.

So in the pursuit of that interest, in approving the litigation budget, in approving contingent fee arrangements with counsel, they are acting as owners of the patents. They simply created this shell in order to try and exercise that right and shield themselves from U.S. discovery.

You have two foreign companies that create this so that they could avoid counteractions as well as shield themselves from discovery. And in the Crown Die case, it's exactly what the Supreme Court said. It said, in the language of the 1920s, this would give the patentee the ability to get a third party to stir up litigation, and that's exactly what has happened here.

So what they have is the ability to control contingent fee litigation engagements, to control the budget with regard to contingency fees, a majority vote with regard to settlement, and a unanimous vote with regard to the transfer of the patents. I would submit those are all the critical indicia of ownership. While they have the form of an assignment, in reality, Sony and Nokia continue to exercise the critical rights of a patent owner, namely, the right to exclude. They just exercise those rights through the shell corporation, MMI.

And I think it's critical to note that when they park these patents for three years, the agreement specifically said that there would be no cash contribution, and for three years, there would be no -- the board was prohibited from requiring cash contributions for three years. They were just parking those patents for three years, and they would get them back until they recently changed that provision.

So I think it's clear here, they don't have standing, they did not have standing when they brought this case. They lacked constitutional standing, and therefore it has to be dismissed.

THE COURT: Thank you very much.

Final remarks.

MR. BAUER: Thank you, your Honor.

So, your Honor, we've got to keep in mind what the main issue is when we're talking about standing. It's the ability to sue more than one person.

The Crown case that they talked about, this 1920 Supreme Court case, they kept the right, the patentee retains the right to make, use and sell, but gives to many different individuals the right to sue. That was that case. That is not this case.

The Pro Patent case that they talk about, Pro Pat case that they just talked about, that case was a

license case in which, right, it wasn't an assignment case. So we've got to keep in mind -- my pages are sticking together here. I'm sorry.

Pro Pat. In that case, the patent -- the plaintiff didn't have legal title. There's no question we have legal title here. So all of the cases, every case they talk about, there was the patent owner, the person with legal title, who then granted something called a license. Now, I know it's not what you call it, right. We have to look at the agreement. But every single case they talked about, legal title was in one person and other rights were given to another. In this case, your Honor, you look at this and as you started with the first question, there's no question we own legal title. All rights, title and interest in the patents were assigned to MobileMedia, period. And then the only question is what other rights may have been granted back.

Once all those rights were granted, what rights might have been given back by the patent owner? And the only rights given back were nonexclusive licenses, ability to get money. No right to control.

One other thing I need to point out. The persons that are on the board who can't have operating responsibility in any of this technology, the agreement gives them fiduciary obligations to MobileMedia. They're

shareholders. They're board members. They're independent board members. Sure, they work for Sony and Nokia, but these agreements require them to be acting on behalf of the party, because we've got to remember, Sony and Nokia aren't one thing. It's not a majority issue. It's two totally independent companies. And we always come back to every other case. A sole shareholder does not have the authority. He can't have it here.

THE COURT: And the two issues about the veto power over the contingency fee arrangements and the services budget, you don't think those are issues that are -- that are determinative of this issue?

MR. BAUER: Your Honor, the board needs to exclusively agree before -- the board needs to exclusively agree before a law firm is retained that's going to take a third of this. That's the same thing as adding another shareholder.

If you recall, MobileMedia's primary business is enforcing these patents. So its primary income is going to be coming in through enforcement of these patents. To retain a contingency fee law firm that's going to get 30 percent, 40 percent, whatever, it's essentially the same thing as bringing in a new member to the board. That's the one thing that the board needs to agree exclusively. Before you bring somebody in and offer them 30 percent of your

profit, we need to agree on that. And the services agreement, once the service company is retained, they can't fire them but for good cause.

So the services company comes in. It's an independent company. There's MPEG, then there's Tagavin, and they come in and they manage it. But it's not Sony or Nokia, and that's not run or controlled or anything by Sony or Nokia, which is what they keep trying to get back to. You have a third party coming in and running this company. So -- okay?

THE COURT: All right. Let's move on to the claim construction issue. You might as well stand there.

MR. BAUER: Okay.

THE COURT: Or were you not going to address that issue? The motion to strike.

MR. BAUER: I would be, but it's their motion, so --

THE COURT: I know, but I have a question for you.

MR. BAUER: Oh, okay. All right.

THE COURT: So we're going to start and try to keep on the schedule here.

I feel like I'm stuck between a rock and a hard place because, on the one hand, I have an independent

obligation, according to the Federal Circuit, to construe claims for purposes of a jury's determination of infringement and invalidity. And if, for some reason, I thought a claim term needed construed because of the way the parties were manipulating it and it turned out to be dispositive, I would have to sua sponte bring it up.

So we've got, as I understand the situation, we have the plaintiff after the close of expert discovery deciding that they need to add to the record, tweak the record, and so on the one hand, with as many patent cases as we process here, I can't have parties independently saying, we're going to ignore the schedule and we are not going to give our opponent's experts the opportunity review claim construction in the context of the infringement and invalidity opinions that we've been hired to give.

That puts me in a difficult position because, on the other hand, if these are terms that truly need -- that are truly important in the resolution of the case, I can't necessarily say, well, then we'll just give Apple's construction by default. The punishment is, Apple gets to construe the claim.

So you've put me in a very difficult position and I'm trying to figure out, trying to review all the materials you've given me, whether any of these late constructions that MMI has offered truly play a role or

whether you've generated a lot of controversy for no particular reason.

MR. BAUER: So, your Honor, I thought we were going to argue next the Magistrate's objection to this motion. Mr. Blumenfeld is going to do it.

THE COURT: That's the source code; right?

MR. BAUER: No, no.

THE COURT: Oh, oh, oh.

MR. BAUER: No. They had their objection to her order.

THE COURT: Right.

MR. BAUER: So that's why I'm still standing here. But as to your motion, your question, Mr. Blumenfeld will address it because it's a local practice issue, and we're deferring to his law firm for these kinds of issues.

THE COURT: All right.

MR. BAUER: I understand your question, but I think Mr. Blumenfeld has been prepared to --

THE COURT: All right. Well, I will be interested to hear, because I don't think it's often that at least without prior discussion with opposing counsel, with the Court, that we add terms for construction after expert discovery is concluded.

So Mr. Blumenfeld?

MR. BLUMENFELD: Right. And, your Honor, just

to put in context what happened here, we had a scheduling order, have a scheduling order that required the parties to exchange terms for construction and the proposed constructions last September. The parties did that on the same day. That was the first time that the parties saw each other's constructions, so that was the beginning of the process, not the end of the process.

And what happened in that process is that we put out 60 terms and 60 proposed constructions. Apple put out a hundred terms and a hundred proposed constructions, and that was the first time that either of us saw the other -- in fact, I think we pointed out in our brief, they said in their paper that they were reserving the right to change theirs to respond to ours, and that's the way the process always works.

The order specifically provided that after that, the parties would meet and confer. They'd discuss. They'd try to narrow. They'd try to work things out and that's always what happens. Six months later, we had a claim chart that was presented to the Court, which had new terms that we put in mainly on -- new constructions we put in mainly on terms where Apple had put forth the construction and we hadn't, because there were a lot of those. There were 30 some of those. And that always happens, that things move forward.

The way the schedule works, what's happening at the same time is that expert discovery is going on and then shortly after the claim construction chart is put in, briefing is going on. And that's a big point here because the terms that are at issue, those have been briefed by both sides.

And getting back to the point where your Honor started, these are legal issues. And we think your Honor does -- if there's a dispute and plain meaning doesn't apply, we think you do have to decide them, that, you know, that you have under the Federal Circuit law, the '02 case, other cases, the duty to decide them, and you can't just say, well, I will take Apple's because the plaintiff said plain meaning.

But we did have meet and confers with them during the course of the next six months, and we did tell them what our provisions were. It wasn't like the night of March whenever it was that we filed the claim construction, saying that they saw our provisions for the first time. What we were trying to do was respond to the things where we hadn't put in a construction in the first instance, and it was based on what had happened in part during expert discovery. No question about that. But our experts gave opinions and the opinions weren't based on nothing. They were based on what had happened during the expert

discovery.

So we do think that you should construe them. There's certainly nothing that required final constructions before the claim construction order.

And as to the prejudice point, it's a little bit hard to understand because both sides are standing here today, and we don't know whether your Honor is going to accept our constructions, their constructions, or whether you're going to come up with a different construction, which is not unusual. And we're all going to have to adjust to that when it happens, when we get the claim constructions, and that's not unusual either, that the experts are seeing the final claim constructions for the first time very close to trial, and we just all have to adjust to that.

And that's where we are. And I really don't think it's different than a lot of other cases where people are adjusting claim constructions, negotiating claim constructions, putting in new constructions. Perhaps the difference here is that we have ten patents and so there are, I think, 25 terms left that are at issue that have been briefed as opposed to a smaller case where there's one patent and there's maybe two or three terms, and so it isn't becoming a big issue. But I think that's the only difference.

But I think this happens in virtually every

case, that we need to have these terms construed where there's a dispute. They've been briefed. And that's the way we think things ought to proceed. And certainly we thought we were following your scheduling order, which did have steps after that initial chart, which would lead to the final chart six months later.

THE COURT: Well, either I -- and I have to say that there's enough going on in my life that I can't keep all of your facts in this rather large case at the forefront of my mind. But I thought the difference between most cases and this case, aside from having aggressive lawyering on both sides, is that the changes, the addition to the claim construction came after expert discovery. And because an expert is confined to his or her report for opining in trial, I guess that's where my concern is, the disconnect between what defendant's experts can do at trial with this new information that they weren't privy to during their exercise.

MR. BLUMENFELD: All right. And on both sides, the experts provided opinions, and they didn't provide the opinions based on nothing. I mean, even where we hadn't proposed things in our initial chart, when our experts provided opinions, they explained what they were doing. We put that into our answering brief on this motion. And so it's not -- it's not exactly the correct that they were just

doing it in the air. They were doing it based on what's in their report, and I think --

THE COURT: I've lost you, Mr. Blumenfeld. They were -- I don't know what they were doing. I understand that your experts -- if I recall correctly -- well, you tell me. Did your expert have the benefit of this information during their expert reporting and depositions?

MR. BLUMENFELD: No, they did not. We did not give them a list which we then did not give the defendant until later.

THE COURT: Right. So none of the experts?

MR. BLUMENFELD: So none of the experts had the specific words, but the way we came up with the words was not just making them up after the expert reports. It was based on what had happened during expert discovery and trying to respond to what Apple had done. But as I said, all of the experts are going to have to deal with claim constructions that nobody has seen because --

THE COURT: Because I have not given you --

MR. BLUMENFELD: Because you have not done it and that happens in every case. And sometimes things come out one way or the other way and sometimes they go down the middle or some other direction that nobody anticipated. But that's because they're legal issues that your Honor has to decide and they do lead to adjustments. But as I said, all

of these terms have been argued by the parties. They're based, at least they're supposed to be based largely on intrinsic evidence and something that your Honor needs to decide so that we can deal with them at trial.

THE COURT: All right. Thank you.

MR. BLUMENFELD: Thank you.

THE COURT: Let's hear from counsel for Apple.

MS. SIMMONS: Good morning, your Honor. Luann Simmons for Apple.

I'd like to first address the question that your Honor asked at the beginning of this discussion, which is, does any of this really make a difference, essentially. And, in fact, the constructions that were proposed for the most part that are new, proposed by MMI, actually do make a difference. Some of them are completely new and involve constructions that could never have been anticipated by Apple or its experts. And, in fact, in one instance, a material change was made to a construction that MMI did offer in September.

MMI essentially had previously disclosed that a structure be construed to include one, two, three elements, and then in March, after expert reports had been served, MMI inserted an "or," essentially rendering one of the previously required structures no longer required. So these changes actually do make a difference. And as your Honor

has noted, the real prejudice here is that these constructions were not offered until after Apple's experts had prepared and fully disclosed their opinions.

MMI had an opportunity to meet and confer, which is what MMI is pointing to, the requirement in the -- in your Honor's order to meet and confer. We had plenty of time to meet and confer about our proposed constructions before opening expert reports. Our proposed constructions came in September of last year. Opening reports did not occur until four months later. And in the cases that MMI refers to where these kinds of tweaking things happen before the final report, before the final claim construction statement, it's always before expert discovery.

So the key here really is that Apple's experts were not given an opportunity, as your Honor noted, to opine on infringement issues and invalidity issues under MMI's newly proposed constructions, and in some cases, changed constructions.

And we think at this point the only appropriate remedy is to strike their constructions. Now, that does not mean obviously that your Honor has to just wholesale adopt Apple's constructions and your Honor will obviously decide the appropriate construction. But at that point, if a new construction comes out of your Honor's decision, the parties would be able to deal with how their experts would address

that at trial. That's not what occurred here.

THE COURT: Well, as I said, even if I believed that under normal circumstances, in a normal discovery dispute, striking a party's proposed information would be appropriate, it's much harder in the claim construction context, because I do have an independent obligation. And if, in fact, we're talking about claims -- I mean, I think aside from the one you spoke about, I think some of these were ordinary meaning, now we have a meaning. They're the most difficult because that's where the parties can really confuse a jury, when they have different ordinary meaning constructions, and my job is to make it easier.

So if striking isn't necessarily appropriate for claim constructions, is there another remedy or something that you would suggest the Court do to make sure that you, your client, is not unduly prejudiced by the way this exercise spun out?

MS. SIMMONS: I don't know that there's a way at this point in the proceedings to avoid some significant prejudice. We have fully briefed what we believe to be dispositive issues based on some of the issues that are raised by these new constructions.

Now, your Honor obviously, your Honor could alleviate the prejudice that would be incurred upon Apple at trial by allowing us the opportunity to submit supplemental

expert opinions based on the new constructions. But at this point, it's hard to imagine how we could remedy the prejudice to Apple for purposes of deciding dispositive motions.

THE COURT: All right. Thank you very much.

MS. SIMMONS: Thank you, your Honor.

MR. BLUMENFELD: Your Honor, I just want to connect one thing, and that is, the statement, the claim construction statement with all of the terms was filed on March 23rd and expert discovery depositions didn't close until six weeks later. And the expert depositions were going on during that period, so to the extent that there was an issue raised by the new constructions, there was a six-week window in there, and we raised with Apple this issue and trying to extend that date. It never happened, but there was time in there. It wasn't like we finished the expert depositions and then we said, now we're going to spring on you a whole bunch of new constructions. That didn't happen.

THE COURT: Well, if, in fact, some of these new constructions I found obligated to incorporate into the matrix of all the information that I used to come to my, to satisfy my legal obligations, then it strikes me that -- well, I'm not exactly sure how we incorporate -- how the experts, who are supposed to testify about these, how they

become opine and share their revised opinions. I mean, do you have an opinion about that process, given the lateness of the day and the fact that I won't be making a decision tomorrow on all of this?

MR. BLUMENFELD: No. And I think that the suggestion that Apple's counsel made that -- I think I said it a little differently, and that is that experts are going to have to adjust, as they always do. When we see your Honor's opinion, your Honor's claim construction ruling isn't going to be any different here. And if it turns out that there are rulings that an expert has not opined on either because it's something that nobody anticipated or it's something that they can say they didn't fairly have an opportunity to deal with, then I think we can, you know, we can and should be able to deal with it at that time.

We're certainly not trying to play a got you here that, oh, we gave you a late construction, you didn't -- your expert didn't opine on it, the Court has accepted it, and now you've got no defense. That's not what we're trying to do here. But it's hard to answer that question without knowing how the claim construction is going to turn out.

THE COURT: Well, and, unfortunately, as we were trying to divine how many of these quote, unquote "new" constructions played into summary judgment, it struck me

that not -- well, if they don't play into summary judgment, that makes it all that much harder because we don't know how it's going to play out at trial.

To the extent they were addressed in summary judgment, I think we can address it. Otherwise, it's very difficult to address because we will have to talk about how we try this case. But to the extent that there are any in the patents that go forward initially, that's going to be a difficult question, and that's the more difficult question.

MR. BLUMENFELD: Understood.

THE COURT: All right. My last, the source code and I'm not going to take a whole lot of time. I've got a report and recommendation and an objection to it.

And let me just go through my understanding of the facts, and then my questions are addressed to Apple.

As I understand the record, MMI asked for source code related to functionality, and Apple's response via letter was, we intend to begin collecting and preparing for inspection the Apple source code that relates to, and then the accused functionality, certain categories of functionality.

And I think the bottom line was that the only source code that was voluntarily provided after all the letters and e-mails was the iOS 4.3 source code. And so as

I understand it, both the Magistrate Judge and MMI concluded, and I think if that is the record, appropriately, that that source code was representative, and now Apple is saying, no, that can't be. It's MMI's burden to prove infringement and we're not obligated to provide source -- we're not obligated to provide the source code to help them prove infringement.

And I guess -- well, first of all, source code is such an elusive discovery matter because although it can create lots of discovery disputes, I think in all my years on the bench I've had maybe two cases where source code was actually used at trial to prove infringement.

So I don't know how you all use it, but I just want to make sure that this isn't a tempest in a teapot, that the source code controversy, and I think I've been -- a writ of mandamus has gone up on another source code issue, and God bless them, I will invite the Federal Circuit Judges down here to deal with you all at this level in the pits.

But I want to understand what the practical problem is and I'm fairly confident that we can work through it, but the language that you all use in your written submissions, quite frankly, turn me off, and so I need to get to the practical issues.

So I need to hear from Apple what the real

problem is, not in legalese, but in terms of trying this case fairly and efficiently, and we'll get to a solution. Forget the legal objections. Let's get to a solution.

MR. RILEY: Thank you, your Honor. And we do want to get to a solution.

The practical problem, the real practical problem is, this is effectively an evidentiary preclusion sanction. You know, we didn't violate any rules, we didn't violate any order that says if they prove infringement with regard to a version of our software, it applies to other versions, soft of unbounded by whether it's an accused product or not. And with regard to some of these patents, it may make a difference. With regards to others, your Honor, I will tell you it does not make a difference.

And the way that I -- and I've dealt with this in many, many cases and I know your Honor has to with regard to representative products and so forth. The appropriate way is through a stipulation and with regard to the actual accused products that are in the case. And I could go through that list, Apple would be prepared to sit down with the other side and say, look, we will agree that the iOS 4.3 is representative of the iOS that runs on those accused devices, but not iOS5, which we don't believe is in the case, and which has not been subject to expert discovery.

And I think if we could get to that point, we could put these other legal issues aside, because they wouldn't be surprised, we wouldn't be arguing if a different iOS and the iPhone 3G. They would not be surprised if we, in turn, wouldn't be penalized because they're trying to read this on an earlier version of the iOS. And I think that's really the way to proceed rather than what is tantamount to an evidentiary preclusion where there has been no finding of bad faith or violation of court order.

THE COURT: Well, to some extent, and I don't know that we're going to have time to do this today because I'm a morning person and I don't function well later in the day, so it's no use keeping me longer because I won't be any good anyway. But we have, what, 14 patents still at issue in this case?

MR. RILEY: We have ten patents at issue. They deferred four.

THE COURT: Oh, all right. We have ten. And ten patents is too much to present to one jury. So at some point -- and I understand that -- well, there are two levels of issues here.

Number one, at some point, and I'm fairly confident plaintiff wants it to be after summary judgment, we've got to decide what patents are going to go forward first, because we're not going to try ten patents to one

jury. On the other hand, I don't know -- I mean, I don't know whether we can punt this issue or whether this issue plays into the summary judgment briefing that I have before me. From our attempt to go through all the papers, it didn't leap out at us that this was an issue that we needed to address in the context of summary judgment, but if it is, I should find that out.

MR. RILEY: No, your Honor. The bases that we moved on for summary judgment do not turn on this issue at all.

THE COURT: All right. So I guess the question is whether I need to -- I don't know how I'm moving the case forward by either affirming or not affirming Judge Thynge's order because, quite frankly, I think the real issue is how we practically get beyond that. So I guess I'm just going to let it sit for the moment. But we will address the source code issue after summary judgment, before trial, to see if there really is an issue left to be addressed. All right?

MR. RILEY: Yes. Thank you.

THE COURT: All right. So I've gone through my issues. I've raised an issue that we will need to address, and that's how we go forward to trial. But am I correct that at this point, since I've let this case go forward with so many patents in the first instance, that I should go

ahead and finish up the summary judgment exercise before we talk about how we go forward at trial? I mean, everyone is in agreement with that?

MR. RILEY: Yes, your Honor. We think that would be very helpful in terms of shaping the trial from this stage.

MR. BAUER: And, your Honor, we agree. As you know, the last time we were here, we did agree to defer four of the 14, and so I think now we have ten here that we need to, you know, at some point we're going to decide which ones. There are some that are duplicates in terms of what products and things like that. But it's too early now to say which ones we're going to --

THE COURT: Okay. All right. You gave me an agenda and I'm happy to -- I even have my computer ready for note-taking. I'm happy to go forward on claim construction or however you all talked about going forward.

MR. BAUER: So, your Honor, just one housekeeping with the agenda you have. We've shortened it even more.

THE COURT: Oh, okay.

MR. BAUER: If I can just tell you the ones that are not on, if you have the agenda letter.

THE COURT: I've got this huge book. I'm trying to find the letter. Is it in here? Go ahead.

MR. BAUER: Okay. So at least on the Morris Nichols letter which had the agenda, we have taken off from argument, we're not withdrawing the issues, but taken off from argument on Patent No. 5, which was the '068 patent, Items 3, 4 and 5, which were the three -- well, I shouldn't say -- input means, processing items and predetermined operation key. So all we have there are the first two elements of that patent.

THE COURT: All right.

MR. BAUER: That's three elements. And in terms of the summary judgment motions, for the '075 patent, we are not going to argue the issue about whether the GSM is admissible prior art, although we will argue that it's not anticipatory.

And we are not going to argue on the '231 patent the issue about the Spring reference being anticipatory prior art.

THE COURT: All right.

MR. BAUER: So that's five issues less.

THE COURT: All right.

MR. BAUER: And then, your Honor, as we understand it, we have the order that is in the agenda. As I understand it, as plaintiff, we'll argue the claim construction, each one, one at a time, and then they'll deal with their response. We each have our PowerPoints in the

right order and so we can back and forth. And after the claim construction, then we'll do the summary judgment motions in the same way.

THE COURT: All right. My only concern is, and, hopefully, you've worked out the timing, is that so often claim construction always takes longer and summary judgment is given a shorter shrift. And it is helpful to me if during the course of claim construction, you let me know that, for instance, Apple's construction fits into their summary judgment argument. And, you know, perhaps it's less than objective because of that.

MR. BAUER: All right. Your Honor, if I could hand up our PowerPoint. We have three copies. I'm not sure how many copies.

THE COURT: At least two. Thank you.

MR. BAUER: And so, your Honor, for timing purposes, I think we have 12 seconds a slide. A lot of these slides are just bookend slides and things like that, just so that it stands on its own. All right.

Okay. Do I need to turn this on here?

All right. So, your Honor, the first few slides are really just to get us grounded, that there are ten patents in the case, and we've just sort of linked them together. When I talk about some of them go to similar subjects or something, the common colors are patents that

will relate to common themes, and so these are the ten patents that are in the case.

And this is why I tell you can I can go through these slides from quickly. It's just a mnemonic so you'll remember what patent is what.

So the '155 patent is an iPhone with positional information. It's talking about how you identify the location. The '828 patent, which is on the slide 4, is displaying images based on the orientation of the device, turning -- so this will help, because when you read these patents, you've got to remember, these are patents that Sony and Nokia did back in the early 1990s, and most people would agree that those companies at that time were the leading groundbreaking companies in this technology.

And so a lot of these patents are -- well, all of these patents are long before we were thinking about iPhones and iPads. But the discussion of them, this is where we're going.

So the words may be different back then. They weren't thinking about smart pads and things like that, but displaying images is the '828.

The next patent, the '078, is a mobile phone with a camera. The '942 is audio storage and playback, you know, how do you hook your iPhone to an iPad, that sort of thing. I mean to the laptop and get your music to it.

The '170 patent is about compressed audio coding. That's probably the most technical of all the patents we talk about today. By the way, your Honor, on that one, there's a tutorial. It's the only one where there's a tutorial. It's the one that has been put together by Apple. It's the only time they go first on these claim constructions. It is very technically complex, at least what's described in the patent. It's coding and decoding and how you handle the signals.

The '430 patent is play list. The '075 patent. Then we get into some of these that deal with how the phone handles calls. So the '075 is rejecting incoming calls, the ability to reject the call as soon as you get it. It's the kind of thing that on your phone you don't even stop to think about, but was back in the 1990s not something people were able to do easily. When the phone was ringing, be able to push a button and not just stop the ringing, but to send the message back to the system. You can drop this call as opposed to hanging onto it the whole time.

So the '231 patent is silencing the ringer of the phone when you need to, when you have that incoming call. So one is rejecting the call, the other is silencing the ringer while you still have it.

What we have as Patent No. 9, the '068 patent, is controlling the connecting state of the call, merging

when you have two calls and being able to have the button that merges those calls together.

And the tenth patent, the '394, is changeable keys, the ability, as you see in this picture, to have different keys on the same screen; right? Way back when, way back when, you had hard keys and it wasn't an easy thing to do. And this patent talks about changing keys.

So those are the ten patents we're going to be talking about, and I hope that just sort of puts it in context that we're not talking about just random patents and they all do end up pointing to the iPhone. Some go to the iPad. Some go to iPods, things like that.

All right. And that's why I say I can get these through in 12 seconds each and I've just gone through 14 slides.

THE COURT: Yes. I think you have made up for it.

MR. BAUER: Okay. So, your Honor, now we can talk about the '078 patent, and, again, we just use that slide. That's why that's a mnemonic. This is the mobile phone patent.

The first term we're here to talk about is a means for claim. Most of the claims we've submitted to your Honor on the pleadings are the means for. There are a few that we picked that we're arguing, and I know your Honor

is well aware of the issues on means for. So on this slide 16, here's the constructions that the parties are talking about.

We have agreed to the function. The function comes right out of the claim element. So the claim was a means for transmitting information. We've agreed it means to transmit a picture captured by the camera and processed by the processing unit.

The issue now becomes what is the structure for that means for transmitting, and we need to focus, your Honor, on the element, this means for transmitting. Right? That's what we're talking about. It's a means for transmitting and it's a means for transmitting information processed by the microprocessor to another location.

So what is the means that the patent shows you? We've got the structure. It's the telephone. We talk about the radiotelephone. It's not a term you use anymore, but radiotelephone. But the patent also talks about cellular mobile phone units, controllers, antennas, that sort of thing. And those come right out of the patent.

This is an instance where Apple's construction talks about, and we put it in blue here, a GSM data interface and a telefax modem, just two very specific embodiments buried in the patent. And when you ask how it affects things, your Honor, if they get telefax modem,

there is no infringement. Our phones do not have fax machines built -- not our phones. The accused phones don't have fax machines built into them. So that's why all of a sudden we have, I think, telefax modem as an essential element, and I will just show you very quickly why that does not belong.

So slide 17 is just a claim, just to put it in context so you can see where the claim comes from in claim 1. It's a means for transmitting that information.

So where is the structure that we talked about? Your Honor, in the patent, column 3, line 37 to 65 -- and I will just show you where each of these things comes from. By the way, I need to mention, when the patent talks about notebook computer, again, it's the dating. The smart phones back then were thought of as notebook computers, but the patent tells you, this computer comprises a radiotelephone. That's the first element we put in the claim.

The next line right beyond that. It tells, you a radiotelephone that is a cellular mobile phone unit 17. That's the second element we put in the construction.

The same thing then goes on. It's connected to a phone controller for the data processing unit and receiver/transmitter antenna. We've added those elements.

By the way, it could simply be a cellular phone, means for transmitting, but we're pulling all of the

elements out of the claim, all of the structure which the Federal Circuit says we need to do, and we're showing you right where that structure comes from. This is the structure for transmitting the information, for transmitting. It's the phone.

The last element is and/or a modem, and in the same column it talks about in the case of a telephone set operating in an analogue network, and there are some networks that are analogue. In the old days, they were all analogue. Now they're digital. Here it's telling you in an analogue network, a modem is preferably connected. Not required, but it's one more thing that you can attach to the cellular phone unit.

Now, where does Apple's construction come from? Why is it wrong? Apple throws in this GSM data interface. Well, in the patent, it is in the same column, right what we were looking at after we talk about the phones and everything. Then it gives you -- Apple ignores the next sentence, which is cellular mobile phone technology is based on the standard cellular phone. Right? There's nothing special about this. It's phones. And then it tells you both data and speech.

Now, data is what we're talking about, right, means for transmitting pictures, right. We're talking about data, not speech. It tells you both data and speech can be

transmitted via the integrated cellular mobile phone unit, the phone. That phone unit, the sentence above says, might have a modem, doesn't have to, but it's the phone.

Now, here's where Apple jumps in. They say, they pull out the data transmission properties are based on an analogue modem and the GSM data interface, for instance, the technology of both.

Now, the GSM issue, your Honor, there are two major phone networks in the country, GSM and CDMA. Right? There's the Verizon network, there's the AT&T network. The GSM is one. The other one is the other. The fact that the patent talks about the GSM one, for instance, the technology being conventional, isn't a requirement of this claim. It's certainly not a requirement for the means for transmitting image information. The means for transmitting is the phone. But Apple adds in this GSM data interface, and then they add, where the patent talked about this analogue modem, which is, what's a modem? It's a thing that allows you to transmit data. Nothing about telefax, which is a special modem. It's a fax machine.

The patent tells you further in that same column at the bottom, and now I'm on slide 23, the functions include telephone services, which are based on the cellular mobile phone, data transmission or speech transmission. Right? Data transmission over the phone. Then it says, or

facsimile services, or electronic mail, or short message services. All of that stuff can be put into the functions of this phone.

Apple just picks out telefax mode. It's not even listed there. Now, there is one place in the patent where it talks about a telefax modem, but there's just one place, and there's just no reason to stick that in there other than it's their noninfringement. It's the one thing, it's the one thing in all of that bottom of that column 3 that they say if we have that, we don't infringe. And there's just no reason to require that.

Now, the patent tells you, by the way, that this data can go by other things besides modem. So on column 8 at line 5 to 18 -- and this is on page 24 -- we distinguish. Remember I was talking about the analogue GSM network? This patent is telling you it can be either. Right? We don't care about the network. The patent is telling you it's about a phone.

So at column 8, line 15, it talks about when the phone unit of the notebook computer is implemented as a digital GSM. It's the alternative. The user can transmit messages over this SMS, sort of like text messages, things like that, which you can attach pictures to.

It tells you the message reading is read by a data collection device such as a camera unit. After the

message has been transmitted via phone to the GSM SMS. So it is telling you the picture can go by things by other than. Well, not by things other than telefax because nothing says it has to go by telefax. But it's giving you by structure. It can be done by e-mail. It can be done by GSM short message.

In fact, the next column, exhibit we have up here, page, which comes out of page 25, this is a place that bitmap images, the digital images can later be forwarded via telefax or electronic mail services. So there's nothing that says this telefax isn't a key part.

And I just wrap up, your Honor, on this, just reminding you, the Federal Circuit case says that for means-plus-function, this is the first one, so it's the one time I will put the case up. That what you need to look at is what was necessary to perform the claimed function. What's necessary to perform the claimed function? And you don't incorporate unrecited limitations.

What's necessary to perform the function? Means for transmitting. It's a cellular phone with an antenna, with a modem, with other things. That's the means for transmitting.

And then there is one last slide, your Honor, and it is when they wanted a telefax modem, they put in a dependent claim. Claim 2 talked about the means for

transmitting is a cellular mobile phone unit, period. Claim 4, where the phone unit comprises includes a telefax modem. They now want to make that telefax modem an essential component of this patent, which they say without it, it does not work, and that's the issue, your Honor.

THE COURT: All right. Thank you very much.

MS. SIMMONS: Your Honor, may I approach to hand you our binders?

THE COURT: Sure. Thank you very much.

MR. RILEY: I'd like to begin by going directly to the means-plus-function issues with regard to Slide No. 8.

So the issue that we're faced with and are discussing today is the means for transmitting, but we have to read that in the context of the entire claim language.

If we could go, what we're looking at is a portable cellular mobile phone. So we're looking at the phone and it comprises a means, comprises under D a microprocessor, and then underneath that, the microprocessors is coupled to the means for transmitting image information processed by said microprocessor to another location using a radio frequency channel.

So the issue here is the means coupled to the

microprocessor for transmitting an image, not text, transmitting an image. And so we have to look in the patent for the structure that provides the transmission for the image. Not text messages, not SMS, but the image.

Let's go to the next slide.

So, again, the steps for construing means-plus-function, and I don't believe there's a disagreement except with regard to the third step. We first identify the function. We must construe the words of the function using ordinary claim construction principles. And then we have to identify the structure from the specification that is clearly linked to the function. And this is where MMI goes off the track. They don't identify the structure that is clearly linked to the function. They identify a close to things, including a structure which is not even in the embodiment which is being claimed, the cellular phone unit.

Let's go to the next slide.

So, again, we've agreed on the function. And note the function, to transmit a picture, not text messages, not SMS, but to transmit a picture captured by the camera and processed by the processing unit to another location using a radio frequency channel.

Now, we've seen the competing constructions, but if we go to the next slide, I really want to focus on the

difference, and the difference is in MMI, they say it's and/or a modem. They make an alternative whereas as in Apple's construction, which clearly links the function to a structure that is disclosed, the modem is required.

So, again, let's turn to the actual figures. Now, the only area in the patent where we have a diagram that indicates this is Figure 3, and there it says, cellular mobile telephone and modem.

So the patent directs our attention to the structure of this modem. And if we go to the next slide, how is that modem described? Well, again, the statute, means-plus-function construction, is a creature of statute and we will return to that in a moment.

It says, let's look at construing it to cover the corresponding structure, material, or acts. The only description of that modem appears as a -- an analogue modem and GSM data interface. That's what transmits the picture image as opposed to the transmission of text images. It is the only structure, only structure which is disclosed in the specification.

So if we turn to the next slide, Slide No. 16, this is the point I was alluding to earlier. And this is why careful review of the specification is required. There are other transmission modes that are disclosed, such as SMS, but at this time, SMS only transmitted text. The

development of attaching photos to text messages is a very recent development. It is not described at all. In fact, you can see the user can transmit SMS messages. No description at all about transmitting photos or images using SMS.

And then they say, well, what about e-mail? Well, it says, an electronic mail message is implemented in the same way as SMS message, but the electronic mail message may be longer. No description at all about transmitting an image or a photograph.

If we can go to the next slide.

Now, in counsel's argument, they pointed to this language about possible telefax, electronic mail services and so forth, but that is a reference to the digitizer pad embodiment. There are two embodiments in here, and, of course, the claims we are asking the Court to construe are limited to mobile telephones.

So it would be inappropriate, in fact, a violation of the means-plus-function principles to look to a different claim structure. The claim structure here is the telephone. The camera unit in the mobile telephone, and that is where we have to find meaning for this structure.

Next slide.

Now, as we heard at the end of counsel's

arguments, they point to a dependent claim, and say, well, look, if it's a dependent claim off of this independent claim that requires a telefax modem, then it can't be required in the independent claim. The doctrine of claim differentiation, which is a judicial doctrine.

The Courts have been very clear on this. The doctrine of claim differentiation, to use the Cour's words in this opinion, cannot trump the statutory means-plus-function construction. And in this case, the Court said, a means-plus-function term is not made open-ended by the presence of another claim, in this case, a dependent claim, specifically claiming the disclosed structure, which underlies the means clause for an equivalent of that structure. Indeed, the doctrine of claim differentiation cannot broaden claims beyond their correct scope, determined in light of the specification and the prosecution history and any relevant extrinsic evidence.

THE COURT: I do have a question, and if I could interrupt before I forget it.

There have been many, many, many times when a patent has issued in year X and is enforced in year Z and the technology certainly has gone beyond, and you know that the technology that the patent is being forced against wasn't in the inventor's mind because no one had invented it

yet.

So when you tell me that I've got to restrict the construction of this first term to what was known, that is the telefax modem, I'm struggling to figure out whether that is really appropriate or not and whether I really am required to be so narrow as to limit the construction to an embodiment that -- you know, maybe the only embodiment that was physically known at the time.

MR. RILEY: And I think that the reason that we are directed toward the actual structure is that they described this element in the means-plus-function language. If they had described the claim differently, we would have a different discussion, but if we can return at least to Slide 11, the statute is very clear, when you are using means-plus-function language, you are limited to the disclosed structure and its equivalents.

THE COURT: Right.

MR. RILEY: You can't just make a general description. You're limited to the structure which is actually disclosed in the patent specification. If you choose to use that language, you are required by the law, the construction is limited to the disclosed structure.

THE COURT: Well, and you're telling me it has to be a telefax modem as opposed to the more general reference to a modem used in other parts. That's what

confuses me. I mean, it's not as if that's the only place they refer to a modem. That's where they refer to a specific type of modem.

MR. RILEY: But with regard to the transmission of pictures, of images, the only description, the only structure is a telefax modem. There are other uses for modems, but with regard to this claim, which, remember, is limited to the camera on the mobile phone. The means for transmission of the images that's described, and the only structure, is the telefax mode.

THE COURT: All right.

MR. RILEY: Thank you.

THE COURT: Brief reply from plaintiff's counsel to that and then we'll move on.

MR. BAUER: I just need to jump back here, your Honor. So they put up claim 73. The claim 1 does not talk about the microprocessor coupled to the means for transmitting. That was something they showed you in claim 73. This just says, the device for comprising a means for transmitting. What is the device? It's a device for personal communication. And the only place where it's talking about, right, it's a device for personal communication, including a means for transmitting image information. All right?

So it's the phone. That's what we're talking

about. Here's the camera. All right? It's a device for personal communication, data collection and data processing, small, et cetera, a housing. It has a bunch of things in it. It does not say anything up there about the phone. And then down here, the device for transmitting image information, the device for personal communication.

The patent tells you on this column 3 at the bottom -- sorry. The functions related: Telephone services based on the phone, data transmission. Data transmission as opposed to speech transmission. And then it says, fax services, electronic mail. The phone alone is enough. And your Honor asked the question, that's why for means-plus-function, when the actual jury instruction, it's and equivalents within the statute.

So you get what was disclosed, and equivalents. We have that sometimes in our claim construction, but I think it really becomes a jury instruction once you've defined it. And the patent simply says, the phone provides data transmission, and then there are other things you can do.

So, your Honor, do you have any other question on that one?

THE COURT: No. I will just have to go back and read claim 73 and 1. Yes. All right.

MR. BAUER: All right. And --

THE COURT: We'll move on.

MR. BAUER: Okay. Thanks.

So now the next one, your Honor, is camera unit.

And by the way, your Honor, you had asked about the claim constructions earlier. Some of these, where we didn't have any, we didn't -- as Mr. Blumenfeld said, what we did is we provided the meaning that the expert had used, but we provided it so that we had something. This was meant -- it wasn't meant to do anything other than provide a clear setup for today's hearing.

So the expert would have said during his -- in his report, says, I've been told to use ordinary construction. To me, ordinary construction means something. And then coming in here today, rather than having a blank on the left, we've said, here's what the ordinary construction is. And that's a lot of these issues that you were asking about before.

So camera unit is one that we don't think needs construction, but we've provided a construction to set the framework for today.

Their definition, a complete image capturing apparatus including at least optical components and dedicated image processing. Well, one thing to be pointed out to your Honor, first, and this is not

means-plus-function. This is defining camera unit. A complete apparatus, including at least some components. Those are inconsistent. You can't have the two. Either it's complete, in which case these are the things, or it's an image capturing apparatus having at least these things. But to say it's complete and then it's at least, they're setting up their noninfringement defense here.

Now, here's why we don't use the definition, your Honor. The claim defines the camera unit. They can't be any clearer. The claim says, a camera unit for obtaining information comprising. It tells you what's in it. And, your Honor, what we've shown you is with their construction, all of their words just come right out of the claim.

So their proposal, forget about complete, because we all know that when it says comprising, it means at least. But what is the camera? They say, includes at least optical components and an image sensor circuitry. The claim tells you that. A camera for receiving image information and optics. It's there.

The next thing they put in, memory circuits. The claim tells you the camera unit has at least one memory unit, so it's right there.

The next element. An interface to external circuitry they add to the camera unit. It's right in the claim, an output coupled to said data processing units. So

what they've defined as the camera unit is what the claim defines as the camera unit.

And your Honor knows that what we do in these trials is you take the definition, you plug it into the claim, and you say, here's what it means. What they are doing is taking a camera unit, which has an optics and memory and output, and they want to put in a camera unit that includes optical components, image sensor circuitry, and an interface to external circuitry, which includes a camera with optics. They are taking the language right out of the claim.

Now, that's three of the elements they take right out of the claim. Now we get -- so we have two problems with their construction. One is the complete and at least. And then it's dedicated. Where did dedicated come from? The rest of this comes right out of the claim. Everything else, but not dedicated. You don't see that word in there.

It's the same thing in claim 73, by the way. Camera unit comprises, and there's the optics and there's the image sensor, which is the sensor circuitry, and then there's a means for processing and storing a portion of the image information, the image processing and memory.

There's nothing about it being dedicated. That means -- now, what's interesting is, I think they think

dedicated means exclusive, but they are not going that far to say it. But that's the problem. If dedicated just means you have memory and you are putting information into it, picture, well, you've told the patent machine, put the picture into that memory. That's one thing. But this is a summary judgment issue. They take the position dedicated means exclusive. That is the only thing it can be used for, and there's nothing in that claim that requires -- we go back to claim 1 or claim 73. It's a camera unit comprising open-ended, comprising at least one memory unit.

And, by the way, your Honor, that one memory unit, if you look in the preamble, it's in -- the personal communication device has one memory unit as well, at least. The same memory unit that's in that whole thing is also used in the camera unit, that you see the same.

So it's a device for personal communication, including a housing and having a data processor, a display, a number of peripheral, at least one memory unit. A camera comprising at least one memory unit for storing. You know, there's nothing about the only thing that memory can do is camera photos. So they're adding a word there that does not belong.

So let's go back. We don't think you need any construction because the claim tells you what the camera unit is in as clear language as you can. But if you are

going to take the stuff out of the language of the claim, at least take it out faithfully and not add a word that gives you a noninfringement defense.

THE COURT: All right. Thank you.

MR. RILEY: Your Honor, I would like to begin by first addressing claim 1, if we could go to slide 6. We did not discuss claim 1, your Honor, because claims 1, 2, 3 and 8 have been finally rejected in the re-exam. MMI, rather than contesting rejection, has filed three separate requests to amend or cancel those claims, and I understand that yesterday, a re-exam certificate was issued, suggesting that those claims have, in fact, been amended. So we did not think it was -- that it was appropriate to burden the Court with regard to construing the claim that is going to go away.

And with that, I'd like to turn to the camera and turn to, first, the prosecution history and explain why it's appropriate to include these elements into this camera. And the reason is that in prosecuting this patent, the applicant said, this is no ordinary camera. It's really something else. It can do -- and, in fact, it is itself novel. The prosecution history requires a camera unit capable of storing and executing complex software, such as optical character recognition, OCR software. This is slide 25.

So any camera unit that is capable of doing something as complex as optical character recognition is going to have the elements which are described in the specification.

And if we could go to slide 23, which describes what those elements are and why Apple's patent, claim construction is correct.

As you can see, the camera unit, which is defined in Figure 5, includes Box 23 is a microprocessor as its own separate memory, a backup, optics. This is the camera which the applicants represented to the Patent Office was, in effect, novel. And so if the camera unit is not defined to include those elements, then we aren't being faithful to what was disclosed to the Patent Office and described in the specification.

Thank you.

THE COURT: All right.

MR. BAUER: Your Honor, as to claim 1, we have not seen what came from the Patent Office. All we know there was something posted last night saying the re-exam will allow. So based on what we expect claim 1, there will be a new claim 1, will have been amended, but with the same terms that are at issue here. So the claim is not going away.

All right. The next term, your Honor, is means

for processing and for storing at least a portion. This has something to do with the camera and the memory. It's the same issue that they were trying to do with camera unit, trying to make things dedicated and solely. And if you look at that same picture that they put up, which is on our slide 41, those are the elements that are within the claim on camera unit, the microprocessor, the memory. We saw all of that. But there's nothing in this image that says that's the only thing they do, and there's nothing in this patent that requires it be the only thing they do.

So the means for storing. So first on the function, there's a dispute, and you asked where does it matter and where doesn't it matter, your Honor. This is one I don't know if it matters. We took the function right out of the claim. That's what the Federal Circuit tells you to do, take the function out of the claim. So we took it right out of the claim. They have an alternative proposal.

Now, I'm not quite sure that it has a substantive difference, but I don't know why they want a different proposal. We're just, again, being faithful to the law that says take the function from the claim, the means-plus-function, but we have that dispute and they will tell us why they think it's important to have it different.

Structure for processing and the structure for storing, which is in the claim. Again, you look at their definition, what's the big issue? Now they want the microprocessor dedicated for -- again, it's dedicated. But the only thing it does is process pictures, that it does not do anything else. And the same thing, the memory is dedicated to storing. It's the exact same issue, is it dedicated? And there's no reason in the claim.

Our structure is a processor to process the image information. That's what we have. It's a means for processing the image information. We need a processor. And how do you do it?

Structure for storing, your Honor. This is one I do want to focus on because this might not come across clearly in the pleadings, I mean in the papers. The structure for storing is not the memory, which is what they want it to be. It's the thing that puts it into memory. Right? It's a means for processing and it's a means for storing. How do you store information? So our proposal is, it's the controller for control and retrieval to the memory unit. It's not the memory itself. And I will show you, your Honor, why that's right.

So the next claim that we get to, if we look at claim 8, we'll see when we talk claim 8, it's just a means for storing. And the parties have agreed it should be

construed the same way. This is just a means for storing as opposed to the other was a means for storing, process storing. But the parties agree, a means for storing is the same.

And claim 8 makes it clear, the means for storing the processed image information in a memory unit it doesn't say the means for storing is the memory unit. It is processing the data and then the computer means the processor to put it in memory.

And then the issue about whether it's exclusive or not, your Honor. This is a slide 41. The image processing -- all it tells you, the image processing unit includes comprises a microprocessor and a number of memory units. It does not say anything about that's the only thing.

You are not going to find anywhere in this patent where it says these memory units are only used for data processing or only used for images. The only way they get to it is by looking at a picture, a block diagram that says, here's our camera unit. And, therefore, they say that's the only thing it can do and that's not right. It's nowhere in there.

And then this is another -- another slide, your Honor, that just confirms the means for storing is how do you put it into -- this is slide 42. Camera unit. This

comes from column 4, 48. Camera unit 14 functions in the following way. And, by the way, this is why we know it's not what's on that card. It functions in the following way, whether it is fixedly integrated in that computer or connected to a card slot.

So that one figure they showed you is the card, you know, that says, here's a card with all the stuff on the card. You know, you don't put a card into it. But it tells you it can be built in, and if it's built in, there's no reason it be exclusive. It's part of the system. But what does it tell you? A picture of a document taken by the camera through the optics is transferred to an image processing unit and through its microprocessor to the memory unit.

So it is the memory -- the processor is putting it into memory. They're different things. And that's it, your Honor.

THE COURT: All right. Thank you.

MR. RILEY: If we could start at slide 26. Again, here the dispute term is a means for processing and for storing, but it is within the context of the camera unit. And I think this is a distinction that was obscured by MMI's presentation because we've got a mobile phone that itself has a microprocessor and then it has a camera unit, and the camera unit comprises optics and an image sensor for

obtaining information.

And here's the key language, in means for processing. So the camera unit as a separate means for processing and for storing at least a portion of the image. And that's what Apple's proposed construction gets at, that distinction between the microprocessor for the mobile phone and the camera unit, which has its own means for processing.

THE COURT: Well, it has a means for processing. I don't see where it necessarily means it's a separate -- I mean, it does not say a separate means or same means. I don't know how you get to the fact that it's dedicated as opposed to shared or what you mean by that. Perhaps you need to explain that to me better.

MR. RILEY: Certainly. Because the only structure that's disclosed shows separate processing units. That's the only structure that's disclosed.

Again, Apple construed the function because we were required to do and we tried to come up with a construction of the function which was a bit simpler. But the key issue here, your Honor, is, as you've anticipated, is, both MMI and Apple's constructions include a processor and memory circuits. So the dispute is, as you alluded to, whether the processor and memory circuits of the camera unit are general purpose or dedicated to processing and storing pictures. As you said, are they shared or are they

separate.

And then MMI adds to their definition this concept of a memory controller, which is absent from Apple's construction, and we believe is not disclosed in the structure.

So, again, I think we go back to the entire context of the claim in slide 31. It identifies a microprocessor, which we can call the CPU to this system. So we've got a portable cellular phone comprising a microprocessor wherein the camera unit comprises a means for processing. Again, making a textural distinction. But we don't have to just rely on that textural distinction. We can go to the actual diagram.

And slide 32 -- and, again, this is the only structure that is disclosed. In figure 3, you can see that the mobile unit has a central processor. Next to it is a display controller and so forth. And this central processor is going to handle tasks like input, output. You can see there's a keyboard that's labeled there at 10. There's an infrared link. It speaks to a display controller, which then displays on the mobile unit. So all of that is contained and controlled by the CPU.

And then we look down to structure 14. That's the camera unit. And in this discussion, the camera unit can be integrated or it can be slid into a slide. But it's

still a separate camera unit. And that's what's discussed in the patent.

And then if we go to the illustration, it shows a separate microprocessor and its own separate memory, backup battery, et cetera, in Figure 5.

So, clearly, the only structure for this means for processing is a processor which is dedicated to the camera unit. There's nothing in this patent that teaches sharing a central processing unit between the mobile phone and the camera unit. That's not described. It's not taught. The only structure that is described is the one that I'm showing on this slide 32.

So, again, given our requirement of linking the means for processing and storing, the Apple construction links it clearly to a dedicated processor and memory circuits because that is, in fact, what is disclosed.

Now, the other thing that is wrong about their construction is they require a memory controller in the camera unit. And as you can see from Figure 3, block 7, the only memory controller is in the mobile unit. It is not in the camera unit. There is nothing in this patent that discloses a memory controller in a camera unit.

Thank you.

THE COURT: And this is all on the assumption that the camera unit is a separate card?

MR. RILEY: Or integrated. It can be either. But it has to have a dedicated processor.

THE COURT: So you are saying that if the camera unit is integrated, even though that is not -- I don't think -- my impression is that that isn't what Figure 5 illustrates, is it?

MR. RILEY: Figure 5 is the only illustration we have of any structure.

THE COURT: Right. But it's not of an integrated camera unit.

MR. RILEY: It could be, if we go back to it. For example, your Honor, the display could easily be integrated into the same system. The mouse track ball, it's hard to imagine that that would be separate from the system. It would be right on the unit.

So my reading of this is that the camera unit is integrated, but they say, alternatively, it could be slid in. Again, because all of these other, you know, the infrared link, keyboard, mouse/ball, battery, display, those are typically integrated into the same structure.

THE COURT: And use the central processor?

MR. RILEY: And use the central processor. But our camera unit as we see -- and, again, this is because of what they were describing. This is their invention. Again, it is a sophisticated camera that has the ability to do

things such as OCR.

When we go and look at the camera unit -- and, again, they're touting this as part of their invention. This is a novel camera that can run application software that can do OCR. It has a separate processor and separate dedicated memory units.

THE COURT: All right. Thank you.

MR. BAUER: So, your Honor, when you look at the patent, what you'll see is that figure that's up there. They could be integrated. I mean, where the camera unit is, just like the phone. This isn't a separate thing, if the box could be around the whole thing or not. So that's why it tells you, you know, what the patent says is, that the camera card and camera unit conform to the block diagram. That's all it tells you, it conforms to that block diagram. It doesn't tell you that's the card. That's just a block diagram. By example, camera card 15 consists of.

So as we talk about, it could be integrated or it could be a separate card. I think this figure applies in both instances. It's just, where do you draw the housing around the whole thing, and then if it is all on the inside, as we discussed, there's actually no requirement in anything here that there be a single microprocessor for it.

All right. So the last element, your Honor, that we're here to talk about is application software, and

this one should go pretty fast.

What is application software? It's something other than operating system software. That's all. Apple's construction is -- it's a computer program. Apple's construction is programmed instructions that perform a function. That's all software. That's just software. But this is application software. It's something different.

The patent tells you, and the claim, you're using application software. Now, we know what applications are. That's a term we all use every day. You know, Outlook and Word and those things are application software as opposed to Microsoft's or, on the iPhone, the iOS is an operating system. But it's not an application software.

Your Honor, this is a dictionary that they've used. The IEEE, everybody uses the IEEE standard dictionary that tells you -- I mean, this is the standard dictionary definition in these cases. Application software is software designed to fulfill specific needs, contrast system software. And the patent tells you, if you look at column 3 of the patent, the operating system and preferably at least part of the application programs, the patent tells you they're different.

There's no shortage of places. We put on this slide at least three. The application program for the camera has a business card handler. There's a graphics

handler. There are a number of accessories and applications. We all know applications are something different than operating system.

And then that's all we say. It's something other than the operating system. Their definition is software. There's no definition there.

THE COURT: All right. Let's hear from Apple.

MR. RILEY: If we could go to Slide 37, please.

So, again, the term application software, and, again, we're in a claim which is going to be amended or changed or rejected. The competing constructions are MMI makes a distinction between operating system software and applications.

THE COURT: And I mean as unsophisticated as I am, there is a difference, generally, in the art. Right?

MR. RILEY: There can be, if we're talking about a desktop computer. But at this time we were talking about time mobile units, and we'll see from the specification that that distinction is not as clear as we would hope it.

And, of course, the concept of operating system has changed over time from DOS, which was a primitive operating system, to the MAC OS. The MAC OS contains utilities, for example, text utilities, which before were separate applications. The concept of operations --

operating system has expanded over time. And, in fact, in this case, during the re-exam, which has been ongoing, at least until yesterday, MMI made the same argument, your Honor, in which they said regardless, one of ordinary skill in the art, a personal communication device at the time the invention was made would not interpret application software to mean software distinct from operation system software. That's what the PTO said, again, recognizing that this patent -- this is slide 39, circa 1994, that on a mobile unit, a small mobile unit, you wouldn't make the distinction between operating system and application. Today we understand that distinction because we download apps to our iPhone and we identify the iOS, but that concept and distinction with regard to mobile units did not exist at the time that this patent was filed.

And, in fact, if you look at the specification where they rely on, it says the notebook computer, according to this invention, comprises a number of facilities and/or application programs. But it then goes on to say, the services used most frequently include functions related to speech communications, telefax function, electronic mail, paging, databank services and online information service connections.

Well, today your operating system handles many of these functions, such as online information services

connection and databank services.

So with regard to the time when this application was filed and the context in which we must read it, there really was a distinction between application software and operating system software. We shouldn't import that distinction in hindsight.

THE COURT: All right. Thank you very much.

MR. RILEY: Thank you.

MR. BAUER: So, your Honor, that was the invention using application programs as opposed to operating software.

This is a validity argument. This is why they are doing it. They would rather have the broad just definition of any software because then they can talk about what people did before, and what this -- this quote that they put up, the invention, according to the invention, comprises a number of facilities or application programs by which many of these possibilities happen. This is the kind of argument, your Honor, that, you know, Microsoft has made, you know, when the whole thing about Windows and whether you can integrate an application to the operating system. And, you know, that was the whole antitrust case way back when, whether -- where you draw the line between an operating system and an application software thing, and that was when they were trying to integrate Internet Explorer into the

operating system and then they said now it's part of the operating system. The whole thing, its application programs, the IEEE tells you what they are.

THE COURT: At the time.

MR. BAUER: That IEEE is at the time. And the thing they put up from the Patent Office, well, that's just what an Examiner said. And, you know, that's not binding under anyone what the Examiner said. What we have is the IEEE dictionary. And clearly, clearly, the patent distinguishes between the two. So thank you.

THE COURT: All right. We've been at it for two hours. Let's take 15 minutes and then we'll go on. Thank you very much.

(Short recess taken.)

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(Proceedings resumed after the short recess.)

THE COURT: All right. You may be seated.

And, you know, I can't imagine we're going to get through everything, even with the deletions in the time that I can give you today. So be thinking about whether we need to come back for another morning of argument.

All right. Where do we go now?

MR. RILEY: Thank you, your Honor. We're going to begin with a tutorial on the '170 patent and then move from that into claim construction.

THE COURT: All right.

MR. RILEY: We appreciate counsel affording us an opportunity to do this. This is the most technically daunting of the patents. Others deal with call forwarding and things that we're used to. This deals with image -- this deals with data compression. Specifically, audio compression.

Fortunately, there is only one asserted claim to be construed here on slide 2, which is claim 49, the apparatus for expanding a compressed digital signal. And MMI alleges infringement based on Apple's compliance with, in the accused products with the MP3 standard. And, again, this is only with regard to decompression or expanding data that has already been compressed.

So the technology tutorial, we're going to cover just a little background on audio compression and expansion, what it is, how it works, and then we're going to go to the concept of time domain versus frequency domain. The patent actually uses the phrase time axis versus frequency axis.

Then we go to the concept of block floating or bit shifting, and this is critical to Apple's invalidity argument, the concept of bit shifting. And then the idea of adaptive bit allocation.

And after we cover the technology tutorial, MMI

will begin with the construction argument on the disputed terms.

So to begin with, the concept of audio compression and expansion. Here I've simply illustrated at the top, we have an audio input represented as sort of a sine wave. We are able to, using technology, compress that signal into a series of bits, ones and zeros, transmitted, say, over the Internet, and then at the other end, expand it back into an audio, something we can listen to on our stereo.

Now, there's the concept of lossless compression. Apple, for example, has a proprietary technology which is called Apple lossless compression so that it will compress it to about half the amount of storage that's required, and then when it decompresses or expands it, you lose virtually no information. That's called lossless compression.

Most compression technologies that we're familiar with are actually lossy compression. In lossy compression, some information is lost. Now, you get tighter compression, you get a smaller file, but when you expand it, it does not have the same fidelity, and the art and science of lossy compression is doing it in a way that the listener doesn't even perceive, even though not all the notes are going to be represented when you come to the

expansion.

Well, this makes a lot of difference. If we look at a CD that contains uncompressed music, it's roughly 74 minutes of audio, and the CD standard was actually pioneered by Sony, and the word is that they decided it would be this size because they could fit Beethoven's Ninth Symphony on it. But we can compress Beethoven's Ninth Symphony if we use the MP3 technology, we can compress that down to one sixth of the space on the same CD disk. But, again, it's lossy compression, so that when it's expanded, it's not quite the fidelity that Beethoven wanted us to hear.

Now, this patent describes both the compression process and the decompression process, and in order to understand the expansion or decompression -- I will use those terms interchangeably -- we have to understand the front end. How did we get it compressed and how are we going to decompress it or expand it?

And so the patent claims an apparatus for compressing as well as an apparatus for expanding. The claim at issue, claim 49, is only the apparatus for expanding. And the tutorial is going to go through some of the concepts in both the compression and the expansion.

Well, the first is this concept of the time domain versus frequency domain, and, again, the patent

refers to this as the time axis versus frequency axis.

Well, if we think about a sound wave, and here I've shown a piano, and we're going to strike two notes, an A below middle C and an A above middle C, and we're going to strike them at the same time. The A3, the one below middle C, vibrates at 220 hertz. The one above vibrates at 440 hertz, but we're playing one sound, hitting them at the same time, and so we get a time domain signal that's a combination of those sound waves that we can represent here as a matter of time as well as the height or amplitude of that signal.

Now, one way of expressing that signal, and this is a way that sometimes it's done, is we could measure each of these areas and represent that digitally and just send the sound wave over that way. That requires a lot of data to represent all of those bits of information.

So what we can do alternatively is to translate or transform that signal from the time domain shown on the left to the frequency domain, and if we do that, we can express that same wave with a lot less information, and that's a way of compressing and one way of doing it, and this is very common in the art, is discrete cosine transform.

And what we do with a discrete cosine transform is we take a particular block of that signal, and I've

highlighted it in yellow, and we transform it from an expression in the time domain to an expression in the frequency domain. And our axes reflect, as I know, there are two notes, 220 hertz, the A below middle C. 440 hertz, the A above middle C.

And then we have this concept of the spectral coefficient, which is a measure of the intensity of the frequency.

So what we do by transforming from the time domain to the frequency domain, we can express that -- that wave, that sound wave, with less information, by going through this -- this DC, the discrete cosine transform. And that's, in fact, a way that this works, and, again, it's very common compression technology.

You can see the compression apparatus has DCT. So we take our information, we run it through DCT, we transform it from the time domain to the frequency domain. We do some other processing. We send it. Well, when we want to listen to it, we've got to reverse that, so we do an inverse DCT, because what we've got is in the frequency domain and we need to get back into the time domain so that we can play it and listen to it.

So the expansion apparatus uses the concept of inverse discrete cosine transform.

So, again, the compression transforms from the

time domain, or the time axis, into the frequency domain, or the frequency axis. And then expansion is just the reverse. We take the frequency domain signal, use our inverse discrete cosine transform, and get a time domain signal.

So with that in mind, we turn to two aspects of the technology, which are important for claim construction, the concept of block floating or bit shifting and adaptive bit allocation. And one way to think about this is ways of processing the data in order to enhance our compression.

Let's turn first to block floating. If we looked at our compression apparatus, before we get to the DCT, there's a block that says block floating determination processing. So we're going to use block floating, we'll get to that in a minute, and then we're going to do our transform into the frequency, and then we are going to release the block.

Similarly, on the expansion, we do the floating determination processing to get it back in the form and then we do the inverse and then we do the release.

So this concept of block floating appears on both the compression side and on the expansion side. So what is it? Well, the concept of block floating is a concept that's part of digital mathematics. Bits, of course, are reflected as ones and zeros, but they can be

expressed as powers of two, as we've illustrated here on slide 18.

The concept of block floating is that you shift the binary data to the left in a process called normalization. So, for example, if we're going to shift our data, and these are -- this represents data in the time domain before we're going to do our transform, for example. We shift it over two bits, which scales up the number. So 32 becomes 128. 56 becomes 224. 27 becomes 108, and so forth, because we're essentially multiplying by four.

So then you must ask, well, why do this? Why increase these values? And the reason is that by getting the most significant data in these rows over here (indicating), our transform is more efficient.

So block floating reduces the complexity of the transform. The transform can operate on just the leftmost bits of the input data, much like scaling any value. You might round up, for example. It's easier to do the math. And, again, because we want this to work efficiently and that's part of what the patent claims, if we do this bit shifting before we do the transform, we can have more efficient transform. That is that's all that is involved here.

Well, you might ask yourself, well, but what if the value runs all the way out to the leftmost bit

space? Well, bit shifting depends on the maximum value. And in this case, in this illustration, 56 is the maximum, which is shown here, because if you shift it over, then you can't shift when you have values that are beyond it. So the amount that you can bit shift depends on the absolute value of the data. And, again, that's discussed in the patent.

So once you do the bit shifting, then after you do, in this case, on the expansion side, we're doing the inverse, the IDCT, we have to tell the floating release, how much did we shift it? Did we shift it one bit? Did we shift it two? Well, we shifted it two, so we need to get it back into its non-shifted form, and that's what floating release does.

So, again, floating determination, we do the bit shift, then we perform either the discrete cosine transform or the inverse discrete cosine transform. Then, after we've done that, we release it. The bit shifting is released. And then this line here (indicating) at the bottom says, the shift amount equals two. We need to know, did we shift one, did we shift two? How much did we shift? Because we're going back from, we've scaled it. We've created a factor, and now we need to get back to the original way in which it was expressed or as close as we can to the original way it was expressed.

And so that's the concept of block floating or bit shifting.

The next concept is adaptive bit allocation. And, again, to orient ourselves to both the compression and expansion, you can see that adaptive bit allocation occurs at the back end. Before, when we're completing our compression, we're going to do adaptive bit allocation. Well, when we're expanding, we have to do adaptive bit allocation decoding, so we're going to encode before we say transmit it over the Internet. Then, when we get it, we want to listen to it, the first step is to decode the adaptive bit allocation. And then we do the floating and then we'll do the IDCT.

Well, the concept of adaptive bit allocation is actually fairly simple, and that is, this is another way of compressing the data by, for example, rounding the numbers. And that's the basic idea of quantization, is taking some quantity, rounding it or scaling it.

And so, for example, again, we're in the time domain, or in this case we're doing -- we're in the frequency domain. We have these coefficients, 32, 56, 27, 41. We do adaptive bit allocation coding. We round them. We quantize them to 30, 50, 20, 40, and then, when we get to the other side and expansion, we take those values and we return them. In this case, to 35, 55, 25, 45, because

that's -- for example, our protocol is to choose the midpoint.

So the concept of adaptive bit allocation is just another way to help us compress the data. Rather than expressing 32, we express 30. It's easier. And then when we return by adaptive bit allocation decoding, we return it to this non-quantized, which may not be exactly what the original value was.

So that is our tech tutorial, unless there are any questions the Court has.

THE COURT: All right.

MR. RILEY: Thank you.

THE COURT: Thank you very much.

MR. BAUER: All right. So, your Honor, so this is just on the first slide, is, again, just a mnemonic to remember we're talking about compressed audio decoding, and the first element we'll talk about is this adaptive bit allocation. It's a means-plus-function. These, I think, I'm going to go through very quickly.

First, on the function, we couldn't reach agreement on that. Again, we just took it right out of the claim, our function just word for word from the claim. They have a function that, whereas before I said I didn't see anything wrong. In this case, I don't even understand it. So I'm not quite sure why they have a different

function. What they're trying to do, it sure isn't going to help the jury understand this any better. And so we just -- the function is what's in the claim.

The structure, again, I'm not quite sure where the big disagreement is here, but, you know, they propose adaptive bit allocation decoding 52. They use the word decoding. I think they mean decoder, because that's what's in the picture. If you look at figure 14, figure 52 says allocation decoding, but it's a decoder.

All we want to make clear, because I'm not quite sure what they're going at is, for this structure -- and, by the way, the arguments will be the same on the next one, too, so it's going to be relatively quick there. It's a decoding means.

It can't -- I just want to be clear, it does not have to be hardware. So that's why I'm not sure when they go to decoder, whether they think there's a hardware thing. I'm just going to show your Honor why it can be both.

And so we just put in -- again, if you look, it's not that far. It's an adaptive bit allocation decoder, but it's a circuit or a single processor which would perform. You know, it does not have to be dedicated. Again, it's that issue of dedicated. So the claim 49 just has the decoding means.

From page 56, we just show you your Honor this

is where I say, and I think that they meant decoder because at column 14, it says the adaptive bit allocation decoder 52. It's that same thing. And then it talks about that. So there's one, no question that decoder 52.

On page 57, though, we show you the patent talks about, you know, aspects, its embodiments. We're trying to just show your Honor it's not limited to one because it's means-plus-function.

So a fifth aspect, the apparatus comprises adaptive bit allocation decoding circuit. That's the language we put into our claim, decoding circuit, that operates in response to auxiliary information. That's the last element we'll talk about later.

But slide 58, your Honor, it does not have to be hardware. It can be software as well. So slide 58 and slide 59 are both just coming out of the patent, column 8 and carrying on to column 9, where it shows you figure 3. There's the decoding, bit allocation coding on the basis of a loud noise, and then figure 5 is decoding. So figure 3 is the coding and then decoding.

What the patent tells you, it's the same algorithym. You're just doing it backwards. So it does not always repeat every word. But what I wanted to show you is on column 8, 62, figure 5 is a flow chart. For explaining the essential part of that expansion processing, that is the

decoding, right, expansion decoding. So we have a flow chart and then it goes through what a lot of -- the processing steps.

And so the other column was the decoding, and it goes through all the processing steps, and then figure 5 is the expansion.

So that's all, your Honor. It's circuit or software.

THE COURT: All right. Thank you.

MR. RILEY: Let's go to slide 28.

So, again, the phrase adaptive bit allocation decoding means -- and, again, it has to be read within the context of the claims, an adaptive bit allocation decoding means operating in response to auxiliary information, a term we'll get to in a moment, for inversely quantizing the quantized spectral coefficients.

And, your Honor, we believe that we should construe the function because it could be helpful to the jury. And, again, as we've seen through our tech tutorial, adaptive bit allocation decoding expands data through inverse quantization. And so we had built into that construction the converting quantize frequency coefficients into non-quantized frequency coefficients, and instead MMI, rather than construe it, just lists the language of the function, which I believe is not helpful, particularly using

terms like spectral coefficients. We tried to explain where that was in this process of decompression.

Now, this is from the patent, and we tried to be as faithful to the structure as possible. The adaptive bit allocation decoding 52, and 52 is the circuit. It's described as adaptive bit allocation decoding.

The critical dispute here, your Honor, is, MMI says an adaptive bit allocation decoder circuit or digital signal processor programmed as described and illustrated in the patent. So they add a new structure, digital signal processor. They add the concept of programming, as described and illustrated in the patent. And that is not found anywhere in the patent.

The structure, as we have seen, is this adaptive bit allocation decoding, which is block 52. The description and the only structure identified is shown here, where it says, in figure 14, the input terminal -- that's the data that's coming in for expansion -- the input terminal is supplied with quantized spectral coefficients, so it's in the frequency domain, obtained from the output terminal of the compressor.

So we're going from the compressor. At the end of the compressor, we're coming into the decompressor. The quantized spectral coefficient is sent to the adaptive bit allocation decoder 52, where the adaptive bit allocation

applied by the adaptive bit allocation circuit in the compressor is reversed.

There's no description of a signal processor, there's no programming of a signal processor. The structure that is identified, the structure 52, nowhere does it describe the adaptive bit allocation decoding done in the claimed invention by the use of a digital signal processor.

Thank you.

THE COURT: All right.

MR. BAUER: So I'm just going to move on to the next one because I think I can overlap some of the same arguments because the next issue is this block floating means for ap plying this inverse. And, again, it is the same issues first on the function. We've just taken it right out of the claim, and, again, they've tried to redefine it.

And I will notice, they told your Honor they think it's clear to say non-quantized frequency coefficients as opposed to spectral coefficients. That's not going to help the jury. I don't know what mischief they're trying to achieve by changing the words, but the experts are going to explain this to the jury just fine, but words like non-quantized frequency coefficients is no more clear than spectral coefficients, and the experts will deal with

it.

Again, the same thing. They've got that one element, the processor 56, and we want it to be clear it's the processor circuits, the digital signal processor. Now, the reason I'm jumping to this one, your Honor, even though they both come from the same figure, there's that allocation decoder 52 -- this is on slide 64 -- and there's the floating determination processor 56 in the same figure.

So they're from the same figure. They're side by side. This one makes it just crystal clear software. The other one, I pointed to the code, the method -- not the code, but the flow chart and the method, but this one just really makes it clear that what we're talking about for both of these is software.

So on page 64 of the slide, again, it gives you one example, the resulting spectral coefficients are sent to the block floating processing circuit. That's hardware circuit. That's one embodiment.

But this is where it goes on in column 10 of the patent, where it talks about this block floating, the same block floating coefficient. The number of steps, when processing is carried out using a microprogram. So this is why it's making clear, it can be in a circuit or it could be software. Here it's talking about a microprogram.

On column 15, this is the next slide, 65, again,

talking about this block floating process in the compressor, determining the size of the block of the coefficient in response to the indexed, possible to reduce a quantity subject to processing or the number of steps of a program.

So, you know, it's just -- and then column 10, we talk some more about steps, the steps provide the operation for determining the shift quantity. And it has this determining the shift quantity, a left shift is carried out. So it's column 6, page 67, column 10. Again, there's that figure with the bit -- the block -- right, figure 9. A flow chart for explaining the block floating operation. All right? It's a flow chart and it tells you in the text, figure 9 shows a software routine for processing each.

So it's much clearer, no question it's much clearer that it's telling you that this is software, but the reason I put them together is the two go side by side when you look at that figure 14, and I think it's -- and when you look at the allocation piece, it was also showing you the code and the whole thing. It's just -- it should be clear from those two that what's going on in these two things could be circuits or software. Certainly, it's much clearer on the block processing. And that's all we suggest is.

Oh, and then there's one other. So when we talk about it's done by the circuit or digital signal processor

as described in the patent to perform bit shifting, I think that just describes what it's doing.

If you look at figure 9, we circled it on page 67. It's showing that shift processing, and in column 10, the steps provide the operation for determining the shift quantity. At the step, a left shift. So it's a software or hardware that does shift processing, and that's what the patent tells you. It's not just the decoder or not just the thing.

THE COURT: All right. So you say either a circuit -- I think you've said either a circuit or software, and when you say "software," you're referring to your structure digital signal processor program.

MR. BAUER: Right.

THE COURT: All right.

MR. BAUER: That's right. And so the program, for example, on slide 67, the flow chart for explaining the block floating operation, there's a program of some sort. And then in the text, figure 9 shows a software routine for processing each.

THE COURT: All right.

MR. RILEY: Our disagreement, of course, is with regard to the programming of the digital signal processor. That is not disclosed as a structure. This flow chart is very common to explain how circuits carry out the function.

This does not indicate or suggest or give a software algorithym at all.

If we can go to slide 46, this is the identification of the structure where it says the resulting spectral coefficients are sent to the block floating processing circuit 56, the circuit, where block floating processing is applied to each block of spectral coefficients in each frequency range.

Nothing about signal processing, no discussion of how the program of a signal processor to carry out this function. This is a circuit that carries it out. This is the only disclosed structure in the specification.

The only reference to digital signal processors -- and, again, this shows that if the patentee wanted to use it, is in the background section and relates entirely to a DSP program to do something else. So if they intended to identify a structure as a digital signal processor, they did not do so. The only discussion is in the background section. And the discussion of these steps relates to the steps undertaken by the circuits, which we've discussed.

Thank you.

THE COURT: All right.

MR. BAUER: So, your Honor, I'm just not sure. I put back up slide 67, and Mr. Riley looked right at it.

The first sentence says figure 9 shows a software routine. He says it doesn't say software. I'm not sure what else he was points go to. Figure 9 shows a software routine, and it is referring to the thing that is the block floating operation in the figure.

The last one, your Honor, is auxiliary information. And auxiliary information is in claim 49. That decoding, that allocation decoding, operates in response to auxiliary information.

Now, your Honor, this was one of those terms that you had asked us to -- this was one where we had added there was no construction, and because we thought auxiliary information -- I mean, we said, you don't mean auxiliary. What does auxiliary mean? It means additional supplemental reserve. It's something other than the main.

They came back with a claim that says, a construction, allowable noise level for each frequency. Well, that's one type of auxiliary information. It's not the only.

So, you know, we came in with a construction that's -- you know, we provided a construction, but, your Honor, honestly, we're perfectly happy with just auxiliary means something other than the main thing. It is the ordinary definition. Again, we were just trying to create the framework for discussion.

And here's what the patent tells you on slide 72. The apparatus comprises adaptive bit allocation decoding circuit that operates in response to the auxiliary information. Right? Auxiliary. It's something other than the main information.

Now, slide 73 is where they come up with their definition, where it tells you on column 8 that the allowable noise level for each critical band is transmitted from the compressor as auxiliary information. It's not telling you it is the auxiliary information. It's one form.

If they wanted it to be the auxiliary information, they would have just -- why even use the word because it's in the claim, and if that's what it meant in the claim, they would have just -- there's the claim. I'm sorry. Well, let me come back.

Claim 51, which depends from 49, does use auxiliary information, and in that one it says, includes the allowable noise level. So this is not a means-plus-function where they say it doesn't count. This is a claim differentiation argument.

Claim 49 talks about auxiliary information, and claim 51 says, the auxiliary information includes an allowable noise. They now want to define auxiliary information as the allowable noise. Now, if it's that

construction, first, 51 becomes meaningless. Now it's the allowable noise level includes the allowable noise level. All right? That's their construction.

But I just want to go back to when you look at the claim itself, which on line 70, all it tells you is that the decoding means operates in response to the auxiliary -- oh, I'm sorry. It's in the preamble that I wanted to point out. The apparatus includes plural quantized spectral coefficients, it includes something, and auxiliary information. It's making it clear it's plural quantize spectral coefficients and something else, the ordinary definition, and something else. And then it tells you to do the decoding means in response to that something else. And there's just no reason to limit that something else to one example, which the patent gives you, but not in a limiting sense. It just tells you which one. Okay?

MR. RILEY: Let's go to slide 48, please.

Part of the alleged novelty of this invention was this concept of auxiliary information, which include noise levels. That's actually pointed out in the very discussion of the abstract. So it's an important term, and just to say that any information that the circuit acts in response to doesn't capture what's described in the specification.

Again, it says, an apparatus for expanding a compressed digital signal including plural quantized spectral coefficients and auxiliary information, and our adaptive bit allocation decoding means operates in response to this auxiliary information.

So what is it? It's just not any information. The fact that, again, late in the day, that MMI proposed a construction, I think, indicates that auxiliary information has no plain meaning. It has to be construed in light of the specification, other intrinsic evidence.

And if you look at the way in which you drop in these constructions into the term, Apple's construction is clearly the correct one. Apple's proposed construction is, operating in response to the allowable noise level for each frequency band, for converting quantized frequency. If you apply MMI's proposed construction, you get something that is incoherent. Operating in response to a component of the compressed digital signal in response to which the adaptive bit allocation decoding means performs inverse quantization, for inversely -- it just repeats what follows in the limitation.

So we must give it some independent meaning, and allow the noise level is the appropriate. In fact, it's what's supported by the spec. The allowable noise level for each critical band is transmitted from the compressor as

auxiliary information. The auxiliary information transmitted is a single allowable noise level for each critical band. Note that. The auxiliary information transmitted is a single allowable noise level for each critical band.

Now, counsel raised the concept of claim differentiation, looking at claim 51, but that is a proper dependent claim because in claim 51, Subsection 3, it says, the auxiliary information includes an allowable noise level for each of the critical bands, and then it goes on to further qualify that. The allowable noise level for the divided band being the allowable noise level for the lowest frequency sub band.

So it says we have auxiliary information, which properly construed is the allowable noise levels, and then dependent claim 51 further qualifies that allowable noise level by limiting and qualifying it to the lowest frequency sub band. So this satisfies claim differentiation and is faithful to the specification.

Thank you.

THE COURT: Thank you.

MR. BAUER: Just very briefly on this. So the quote that he just gave you at the end, where he pointed to the allowable noise level is transmitted as auxiliary information, you've got to look at that in context. The

paragraph right in front is talking about various possibilities for one critical band are shown in figure 4. So it is just giving you an example, and as it goes through that example, in that example, the allowable noise level is transmitted as auxiliary information. That's an example. We don't disagree with that. But the claim itself -- I pushed the wrong button.

So that's all, your Honor.

Yes. Auxiliary information is one example. The claim says it includes it, it doesn't require it, and that's all we're saying. And, again, in terms of the construction, we're perfectly fine with something that's not the main. It's what claim 51 is, something beyond what's in that thing. That's what auxiliary means.

All right. We now get to go to the '075 patent, your Honor, and this is the one about rejecting incoming calls. And there are just two terms we're going to talk about. One is rejection message. And, your Honor, this is one that we added, again, or changed one of those that you asked about.

And what you will see, what we did, again, to the extent there was a change, nobody is surprised. We just made it as close to theirs as possible because we wanted to frame the issue. So our proposed construction is the same as theirs, but they had proposed this word "single," and we

wanted to make clear that's where the dispute is.

So that's why we say we added something. No expert is going to be caught by surprise here.

So what is the dispute on rejection message? They want it to be a single communication, this rejection message, and we just say it's a communication to reject. So what are we talking about? I thought we had it. This isn't the one we had? This isn't the one of the picture back and forth? Okay.

This is one that had a summary judgment issue, so we had a slide to put it in context. But what's happening, your Honor, and I will just -- is depending on the network, when you want to reject your message, you push your button. All right? This is an incoming call and you don't want to hear it and you don't want them to hear the ringing for the full minute, so you can push the button and it just goes off to voice mail. That is the rejection message.

So some networks, when you push the button, it sends a rejection message back to the base station that says drop it. Other networks, you push the button, it sends a message saying reject it. It sends you a message back saying, are you sure? Just electronically, not to you.

Back to the phone saying, I got this. The phone

sends another message saying, yes, reject it, because otherwise they might be dropping calls you don't want to drop.

So that's all we're talking about, but it's their infringement case, because when some networks send a message, then it's confirmed, and then another message. That is why they want it to be single as opposed to two.

What does the claim say? The claim doesn't say that. The claim, not means-plus-function, ordinary language. Transmitting a rejection message to the remote transceiver in response to a determination that the incoming call is to be rejected, the rejection message being. So it's as easy as you can get. What is a rejection message?

The patent gives an example, and this is why they come up with the single. But the patent tells you, provides this messaging sequence. This is at slide 81. This long messaging can be used in telecommunications systems. But here's what the patent tells you. This is one system in accordance with the IS-95 standard. The very next sentence, it will be apparent to those skilled in the art that by substituting the corresponding protocol and processes, the disclosed call rejection invention may be implemented using different message sequencing. It does not require any one particular thing. The whole idea here is

sending a rejection message to drop the call and not that it be a single message as opposed to two.

Similarly, on slide 82, there's another example and it says the same thing. This messaging sequence 600 is in accordance with the IS-95 standard. It will be apparent to those skilled in the art that other systems can be similarly implemented using different messaging sequencing. There's nothing special about it. You read Apple's brief. They sale you've got to read it as single because there's the word "a" in the claim. It says "a rejection message." They say you have to read it as single.

I'm surprised they made that argument, your Honor, because any patent lawyer knows, and we got the Federal Circuit. This isn't even -- this isn't even close. The Federal Circuit says that "a" or "an" can mean one or more. One or more is described as a rule rather than a presumption.

In patent language, when you say "a rejection message," it does not mean single. It's a rule it doesn't mean single. Apple argues that because they use the word "a" in the claim, you've got to give it to single. Let's go back. You can see the claim.

So transmitting from the mobile phone a rejection message, and so Apple says in their brief, oh, there's the word "a." That means one. And that might look

right in ordinary English, but the Federal Circuit says not in patent language. It's a rule, it is more than one. You don't get to do that. The construction, that's the one dispute.

MS. SIMMONS: Your Honor, I think it would be helpful to provide a little bit of background on the claimed invention on the '075, so we would like to start with that.

First, there are three claims that are asserted from the '075 patent. All of the claims, as counsel mentioned, are directing -- directed to rejecting an incoming call to a mobile phone. The claims are very specific about how this is to be done, though. The claims say that the mobile phone must send a rejection message to the remote transceiver, and the remote transceiver is just the cell tower or the base station. And that message has a very specific purpose as it is claimed in the invention. And it, in fact, says it has a single information element included within the message to fulfill this purpose, which is to instruct the remote transceiver to immediately release the incoming call.

As the patent originally issued, the invention claimed rejecting both first and second incoming calls. And figure 2 and 4, which are shown on slide 6 next to each other, show the method for rejecting a first incoming call

in figure 2, and for rejecting a second incoming call in figure 4. The process is an essentially the same, the only distinction being that for rejecting a second incoming call, as you might imagine, the phone is already on a call when it receives the second call.

During the re-examination MMI narrowed the claimed invention to only rejecting a second incoming call, so that's the only process we're dealing with at this point.

So let's look at it in a little bit of detail. As is self-evident from the title, rejecting a second incoming call, the phone is on a current call, and this is shown on slide 8, when it receives an incoming second call. This is just a call waiting call that comes in.

The phone claimed initially, I'm sorry, the patent claimed an ability for the phone to automatically reject an incoming call using a rejection list or a call block list. So that determination happens when the call comes in. The phone determines, is the phone number for this call that I'm getting on my blocked call list? And if it is, the phone does not even alert the user that the call came in, because the user has indicated by setting up this rejection list, I don't even want to get these calls, and the phone immediately sends the rejection message to the base station. And, again, the important thing about the

rejection message is that it tells the base station, you need to immediately release this second incoming call.

Now, when the determination is made regarding the rejection list or the blocked call list, if the phone determines that the phone number for the second call is not on this rejection list, then the phone will alert the user of the second incoming call and will give the user the opportunity to decide to do a manual rejection of the call, is how it's referred to in the patent.

So the user can press a button, in some way indicate to the phone that the user has decided to reject the call. The phone will then send the rejection message that will instruct the base station to immediately release the second call.

So turning to the disputed term that counsel just addressed, the rejection message.

As we just discussed, the claim in claim 5 is representative, describes the method of receiving the second incoming call, determining if it is to be rejected, and then transmitting this very key element in this claimed invention, this rejection message, whose sole purpose is to instruct the wireless system that the call is to be immediately released.

And as counsel mentioned, Apple proposed in September of last year, pursuant to the Court's scheduling

order, that rejection message did need to be construed, because it does not have a plain and ordinary meaning. It's a very specific concept and it's, in fact, the key part of the invention.

So Apple construed rejection message to mean a single communication, and this is just from the claim language, sufficient to cause the base station to immediately release the incoming call.

MMI initially proposed no construction. And as counsel had explained, in response to Apple's infringement theories and contentions and specifically expert reports, where our experts demonstrated that no such single communication is sent by an iPhone to immediately release the second incoming call, counsel then proposed a construction which, while the words look very similar to Apple's construction, there's a very material difference. The word "single" is critical and so this is not just a tweaking of Apple's construction.

And as counsel mentioned, both Apple's construction and MMI's construction require that there be a communication sufficient to cause the base station to immediately release the call, but the key issue is that under Apple's construction, this communication must occur within the single message that is sent from the mobile phone, whereas under MMI's construction, any number of

messages sent from the mobile phone and, in fact, apparently any messages even sent from the base station can be included in what is defined as the rejection message.

The claims are clear and disclose a single communication that is sent from the mobile phone. And it is important that it is a single communication, because the role of the rejection message, again, is to say to the base station, you need to immediately release this call as opposed to a situation where any number of messages could be sent, which over time will cause the base station to release the call. That's not what was claimed.

And, yes, it is true, "a" doesn't generally mean just one and only, but this -- but the Federal Circuit has instructed that it can mean one and only if that's what the claims and the specification require.

And when you look at the specification of this patent, every embodiment, not just one embodiment, every embodiment discloses a single communication that is sent from the mobile phone.

And in figure 6 we've blown up the relevant portion where the phone has detected user manual reject input. So that's what we talked about earlier, where the user can manually reject the call. The phone sends a single rejection message across the communication channel, and upon receipt of that message, when the message is received, as it

shows on slide 16, the call is released.

MMI's construction would include any number of messages being sent over some period of time from the phone, back from the base station, and ultimately the call being released. No message contains information sufficient to cause the base station to release the call. Other messages are needed, but no claim or embodiment discloses the base station waiting to receive additional information or to receive information spread across multiple messages. In fact, the specification clearly states, as we've shown on slide 17, that the base station releases the call when it receives the message.

In support of their construction, MMI refers to portions of the specification that address messages other than the claimed rejection message. Specifically, they, in their initial briefing, as we've shown on slide 18, refer to a portion of the specification that addresses a message that is sent by the base station after it has received the rejection message. So that clearly can't be the rejection message.

And then, as counsel addressed earlier, they've referred to this figure 5, which illustrates the entire messaging sequence that occurs between the mobile phone and the base station, beginning with, there's an incoming call. I'm alerting you. How are we going to handle this, the

entire sequence? That clearly can't be their claimed rejection message. And the fact that the specification indicates the rather uninteresting point that the messaging sequence disclosed on slide 19 and figure 5 from the patent is illustrated in accordance with a particular standard, the CDMA standard, and one of skill in the art could implement this entire sequence using a different standard that in no way indicates that the rejection message, the very specifically claimed rejection message, can be anything other than a single message.

THE COURT: All right.

MS. SIMMONS: Thank you.

MR. BAUER: Your Honor, just so you can visualize what we're talking about, this is the image. This will be slide 32 when we get to our summary judgment briefs, for the record, but this is what we're talking about.

You click on the phone decline. A message goes to the station. It sends a message back saying release, and then it says, yes, please, and it releases.

So when they talk about a -- that number 4, the release complete, that's a rejection message. Two is a rejection message. Right? What they want to do is say, but it can't have any communication back and forth. But even under their definition, where it's a single communication, the item number 4 would probably satisfy

that. But we just don't think you need to limit it to one because the patent tells you clearly it has to do with the system you use. You pick it based on this system.

All right. And, by the way, your Honor, this issue was one that was clearly delineated between the experts. They didn't catch -- well, it was after all the expert discovery that we changed this. This was the issue with the experts, and so, you know, whether it could be a single one or had to be. You know, only a single one-way message counted.

All right. Then we talk about the one other element here, the wireless system, immediately release the incoming call. And that goes hand in hand with that picture I showed you.

What they want it to be is the instant you get that signal first message, you immediately release it. That's their contention. The instant you get it, you immediately release it. And we say -- and, again, we have tried to make clear just where the dispute is -- immediately means before the whole phone call runs. All right? It's not a -- and I will show you, your Honor. Immediately here isn't the computer sense that the instant you get a message, drop it in microseconds. Immediately here is from the context of the viewpoint of the user, and the context and viewpoint of the user is, I don't want this

call, push the button, make it disappear instead of going through the whole call cycle. You know, you don't have to let it ring six tiles. You drop it without waiting. That's immediately. And, again, their construction is to have a single message essentially. You don't -- they want it to be so fast, you don't have that handshake, do you want it to drop or not.

So, your Honor, slide 87, here's where the claim talks about it. The wireless system is to immediately release the incoming call. All right? And we go back. What's the claim? It's a method of rejecting an incoming call. It's a method of rejecting. And all the elements, this isn't a computer sequencing, it's receiving at the phone a transmission, determining at the phone if the call is to be rejected and transmitting from the phone a rejection message.

All right. This isn't about instantaneous or sequencing. And it's transmitting a rejection message that the incoming call is to be rejected. That rejection message, including at least one information element, indicating that the system is to immediately release it. Now, immediately, I said refers to the user.

Slide 88, this is text from the patent. The first one is column 2, where it talks about present systems do not allow mobile to refuse to accept calls, nor do they

provide mobile phone users with a rejection on demand capability to immediately reject. That's what "immediately" means here, the rejection on demand.

Column 2 at line 65, we have another call out. If the second call is not answered, the call alert to the mobile phone user will continue for a time period to find the ringing cycle. Unless the mobile phone user answers the call, there's currently no way to terminate it. So that's what we're trying to get at, how do you terminate it now instead of waiting. It's rejection on demand.

And column 4 talks about, you know, when you get that rejection message, once the base station receives the rejection message, the call is released. It's not a matter of timing. It's when you get it, you reject it.

And that's really all there is to say, your Honor. Immediately is from the viewpoint of the user. It's rejection on demand, not the instant I get my first signal from you, drop it right away.

THE COURT: All right.

MS. SIMMONS: Your Honor, as we explained with respect to the claimed invention and the rejection message, this concept of immediately release is all tied up in the rejection message. And the entire method that is disclosed in this the patent isn't talking in the claim about the user's perception. The claims are talking about messages,

so this is about what messages are being sent between the phone and the remote transceiver.

Apple's construction for immediately release, which it disclosed in September of last year, is without requiring any additional action by or communication from the mobile phone. This is consistent with the specification's disclosures. And, again, MMI did not propose a construction until after expert reports.

MMI's construction after it received Apple's noninfringement expert reports was to turn immediately into, without waiting for the duration of the ringing cycle and before completing a connection between the mobile phone and remote transceiver.

I think there can be no argument that this is the plain meaning of "immediately," so this is clearly a construction that was offered after expert reports in an attempt to deal with Apple's noninfringement opinions.

Under Apple's construction, true to the specification, the base station must release the call upon receipt of the message. And counsel actually pointed to a part of the specification that we will also point to. Upon receipt, when the remote transceiver receives the rejection message, it must release the call. Under MMI's construction, by contrast, the release need not occur upon receipt of the rejection message.

This is the same quote that counsel just put up in support of MMI's construction, but, in fact, it clearly shows that the specification requires that the base station releases the incoming call upon receipt. The base station does not wait for additional messages to release the call. Upon receipt, the call is released.

The plain meaning of immediately, in fact, also supports Apple's construction, because immediately means without intermediary, in direct connection or relation. Nothing else needs to happen. As soon as this message is received, I will release the incoming call.

MMI's construction changes the word "immediately" to mean two things. Any time during the ringing cycle and without completing a section between the mobile phone and the base station.

Looking at this first part of the definition that MMI proposes for the word "immediately," without waiting for the duration of the ringing cycle. This construction, or this portion of their construction, assumes that there is a ringing cycle and the base station is simply not going to wait for it to complete the duration of the ringing cycle before placing the call, but this conflicts directly with the automatic call rejection embodiments that we discussed in our overview of the '075 patent, where no ringing cycle ever even begins.

The second portion of MMI's construction of what the word "immediately" should mean includes, before completing a connection between the mobile phone and the remote transceiver. So the mobile phone and the remote transceiver are not yet connected.

Apple noted in its briefing that this conflicts directly with the claim language itself, which requires that said mobile phone is in communication with the first calling station via the remote transceiver. So the mobile phone is already connected to the remote transceiver.

In reply, MMI argues that what they meant by before completing a connection was before completing a connection for a second call. But this also conflicts with what the patent discloses. The specification describes the fact that, as would have to occur under any telecommunications standard for a phone call to be received, the mobile phone has to be in communication with the base station in order for the base station to even be able to inform the mobile phone that there is an incoming call and then teeter back from the mobile phone as to how the call should be handled.

So there must be a connection, there must be a ringing signal. MMI's construction is simply not supported by the specification.

MR. BAUER: So under this sequence that's on

slide 32 from the summary judgment briefing, their proposal, even under their proposal, the second, the release complete is a single communication sufficient to cause, and a disconnect is a single communication sufficient to cause. This communication causes the disconnect. Item No. 4 caused the disconnect. The fact that there's an intermediate handshake doesn't change it. We just don't think you need the word "single." It is a communication sufficient to cause.

And the immediate that is item number 4, that release complete causes the call to drop immediately, but, again, we don't think you need to construe it. How fast is immediate? It's during the call cycle. It's on demand. It's when the user wants it dropped. And how fast does it happen, whether it takes two signals back and forth or one, it's all happening at the same time, or it's happening quickly.

All right. Your Honor, now we get to move on to the '231 patent, and this one is about silencing the ringer on the phone.

There are three terms, and this is going to be very fast, I believe.

The first one is an alert sound generator for generating the alert sound. Then there's going to be the control means for controlling that generator and then

changing the volume and stopping the sound.

So just looking back at slide 92, what we're talking about, the sound, right, incoming call, your phone beeps. There's an alert. You have an incoming call. On the iPhone, you push the button on the top, the call stops. It just silences it. So that's what we're talking about, just turning off the beeping in your pocket while you are sitting there in a meeting, silencing the ringer. And what you will see is the arguments they make are interesting.

So what is the alert sound generator that's in the claim? This is one, your Honor, we added to give you its ordinary meaning. What is an alert sound generator? Our view was it's the generator capable of generating an alert sound. They turned it into a means-plus-function limitation and so we've provided the definition of what's the ordinary meaning. Nothing extraordinary. And by the way, Ms. Simmons pointed out the other one was the ordinary meaning, too, we're proposing.

We're proposing, just trying do get the words down. What's the sound generator? It's the generator capable of generating an alert sound. That's the ordinary meaning.

Now, they have means-plus-function. There's no means-plus-function in this claim. Everybody, you

know, as a general rule, you've got to have that word "means" in there or something to make it means-plus-function. There are some exceptions. This isn't it. We have a generator for generating an alert sound. That's what we propose.

Page 95 shows the claim in context. It's an alert sound generator. This is just a Federal Circuit case. Claim terms reciting sufficient structure are not means-plus-function. And, by the way, when you look at the structure, ours just provides as much structure as theirs. Their structures is generator. So it's not like they're saying you need more. They are not saying we need a battery and a computer and a microprocessor. Their structure is the same. So why do they want it as a means-plus-function?

And what does the patent tell you? It's just ordinary meaning. Slide 97 from column 2, it just tells you that the CPU to text the call with the alert on/off controller 12 makes an alert sound generator generate an alert sound. Figure 2 shows you a box. That's the alert sound generator. It tells you it's a box, figure 2 is a block diagram showing you the equipment. So the generator is the generator of the sound.

And their expert -- the only reason I get to deal with this is because they make the argument about

means-plus-function. I thought it would be easy, it's a generator. But their own expert talks about, what do you understand that generator to be? And he says, it's a mechanism for creating the sound from a transducer, which is a microphone or a speaker. In other words, the speaker and the signal that need to be generated to provide the transducer. It's just -- it's the thing that generates the sound.

MS. SIMMONS: Your Honor, in the interests of time, I will try to get through this one quickly so that we can focus on some of the other claim terms and other patents. But what Mr. Bauer just said actually highlights the reason this term should be construed as means-plus-function even though it does not have the magic language, which is that, according to their construction and according to the limitation itself, what that means is a thing that generates the sound. We have no idea what that thing is, how it generates the sound. This claim actually does require construction and does require a means-plus-function construction.

The claim limitation is defined in purely functional terms, alert sound generator, a thing that generates a sound. It's defined purely in terms of what it does. Therefore, it does require means-plus-function construction.

And Mr. Bauer alluded or referenced Dr. Balakrishnan, Apple's expert, referring to this claim limitation as a mechanism for generating sound, but the Federal Circuit has clearly held that mechanism is essentially the same as saying means.

So, in fact, what Dr. Balakrishnan said was, this is a limitation that is only described in terms of what it does. I don't actually know what the structure is. It's not defined by the language itself.

So we think the rest is set forth in our papers. Again, in the interests of moving along, I will submit on that.

THE COURT: All right. Thank you.

MS. SIMMONS: Thank you.

MR. BAUER: So I don't need anything else on that one, your Honor.

The control means for controlling. In this case, on slide 102, we do agree that the function is what the claim says, controlling the alert sound generator. Their proposed structure is just the word "controller." And, again, I just don't know when they say just "controller," the number 12, what it is that they're targeting. I mean, the patent talks about controller 12 within the patent, but I think when you look at the patent, you'll see it's the combination of the CPU and this

controller that turns on and off the sound generator.

So the claim says a control means for controlling said alert sound generator. That's in the claim. The patent at figure 2 shows that alert on/off controller, element 12, at page 104 and corresponding text at column 2 tells you when a call is given to this portable phone from another party, the CPU 7 detects the call, and it performs control to turn the on off controller. That's why what the patent is telling you is, the CPU controls the controller to make the sound generator. So that's why we put the CPU into the claim element as what's the controller. We say it's the CPU and the on/off controller because the two go hand in hand.

Page 105, again, it tells you, CPU 7 performs control to turn off the alert on/off controller to stop the generation of the sound. And so then, page 106, this is what we talked about, associated programming. In our proposal it's the CPU and the sound generator program. Just because it's means-plus-function, we're just showing you that there is more to it than just a box because we know that if it's only a box, you might have a problem. So on page 106, it tells you what's going on inside that box, so that is just our proposal, your Honor.

THE COURT: All right. Thank you.

MS. SIMMONS: Your Honor, the control means, as

counsel mentioned, is a means-plus-function limitation whose purpose is to control the alert sound generator.

The parties agree on the function, as counsel mentioned. Apple's construction for the structure is the only disclosed structure in the specification, and MMI's construction, by contrast, doesn't help the jury to understand what this structure actually is by including just a rearrangement of some of the claim language.

By indicating that this is a CPU and an associated alert sound controller, that seems to just be restating that it's a controller whose function it is to control the alert sound generator, which will not help the jury understand this claim limitation.

Again, the claim, as was shown on slide 18, controller 12 is the only structure that is disclosed in the specification for controlling the alert sound generator. And the alert sound generator and its controller are separate from the CPU, contrary to MMI's proposed construction, which includes the CPU in the construction. Instead, what the specification discloses is that the CPU is responsible for detecting that there's an incoming call and then alerting essentially the alert sound -- the control means. The control means then takes over from there and takes over control of the alert sound generator.

Including a general purpose CPU without a

disclosed algorithym in the construction is improper under the Federal Circuit's case law, and there is no disclosed algorithym in the specification for how this general purpose CPU isn't -- can affect control of the alert sound generator.

Can we go to slide 22, please.

And MMI's addition, as I mentioned earlier, of alert sound controller in the construction, or the proposed structure for control means, is simply a restatement of the function of the control means and does not help to define or identify what the appropriate structure is.

And recall the structure must be linked back to what is disclosed in the specification. And it can't be just a restatement of the function. It has to be what is actually disclosed in the specification as the structure for performing this function.

Apple's construction is the only construction that identifies and is true to the one structure disclosed in the specification for performing this function.

Thank you.

THE COURT: All right.

MR. BAUER: We are moving fast now, your Honor.

So I just want to point out, the concern is with what they're saying, and if I -- the claim says, control means for controlling the alert sound generator. Right?

That's what the claim says, control means. They equate it with the thing in the patent that says on/off controller. Now, that's certainly part of the control means. We don't disagree. But it's not the only thing.

When you read the text, the text says that the thing that -- it's the CPU and the on/off controller turn on the sound generator. So that's why we say it's the control means is those two things. There is nothing in the patent that says the on/off controller 12 is the control means of this patent. It's part of the control means, no question about it, but when they -- when they want the claim limitation to be limited only to that, they ignore the whole system here.

THE COURT: And what about the suggestion that absent an algorithym, it is improper to reference the general purpose computer and incorporate that into your structure?

MR. BAUER: So, your Honor, the algorithym doesn't have to be at the level of source code; right? It doesn't have to be the computer. That's why I put up slide 106. It's telling you what to do.

If the call comes in, the operation shifts to a state in which the alert sound is generated to inform the user. In the case where the user wishes to respond, I think there is algorithym telling you what to do with that CPU.

When the incoming call comes in, the user depresses the key to shift the state to stop the alert sound, and then the state shifts to the State ST4. I think there's an algorithym there and that's why I put it up before.

THE COURT: All right. Thank you.

MR. BAUER: All right. Now, the last one, your Honor, is the change of volume and stop the sound and this -- I don't know what to say on this one.

What does it mean? So these are terms that we didn't think you needed a construction and we did because change the volume of the sound, we thought everybody would know what that means. And so what's the construction we proposed? Change the volume of the generated sound. We just want to make sure we get it right. Stop the sound, we said stop the sound. There's no special construction.

Apple's proposal is just to change the word, change the volume to change the degree of loudness. Well, what does that mean? Those words aren't in the patent. That is sure not helping the volume. Change the volume the jury is going to understand. And Apple's construction to mute the sound. Stop the sound means to mute?

In ordinary English, you might say mute it, but this is a summary judgment issue. They're going to say they don't mute it, they turn off the signal. They distinguish

between the signal that makes the sound and the sound.

And so you'll see in their summary judgment motion, what they say is, when they want to stop the sound, they stop the electronics that generate it as opposed to muting means the electronics are still there, but you've turned off the speaker, so to speak, and so that's what they're trying to get at. Stop the sound means stop the sound however you do it. That's all. Change the volume. And the patent, the claim talks about stopping -- the generator stops the sound. That's all it says. It's nothing about muting in the claim.

The controller stops the generation of the alert sound, and then we talk about volume on slide 113. We all know what -- you affect the volume, and I don't know where they're going at with change the loudness or why you need that.

THE COURT: All right.

MS. SIMMONS: Looking at the claim language to see where this language actually comes in, these specific limitations is important because it's describing something very specific.

The claim language describes a situation where there's an incoming call and the alert sound generator generates an alert sound. So you have a sound that is being generated. The control means is then going to control that

alert sound generator, and one of the ways in which it will control it is that if the user pushes a button, then the control means will control the alert sound generator to change the volume of the generated sound.

And the reason that to change the volume, which certainly does appear like a phrase that we could all understand, the reason it does need construction is because MMI, in fact, is construing to change or applying their construction of to change a volume to include, to stop generation of the sound. Not an operation to change a volume of a sound that is being generated, but to stop generation. That's not what the claim language says.

Then there's this issue of the dependent claim, claim 2. And the numbers seem off on the claim language, or the claim numbers, as we've illustrated claim 2 on slide 25. The reason is that during re-examination, claim 1 was canceled and its limitations were imported into claim 12. So it looks a little odd, but claim 2 does depend from claim 12, as that claim issued in re-exam.

Claim 12, therefore, is a dependent claim from claim 12, and claim -- I'm sorry. Claim 2 is a dependent claim from claim 12, and it claims further -- this is a limitation on how the volume shall be changed. It claims, stopping the sound.

Apple's constructions are true to that claim

limitation and how it is disclosed in the specification and in the claim language itself. Change the degree of loudness, which is simply a way of defining what volume is of the alert sound that is being generated. And that's really the important part.

The same with stop the sound, which, again, is a dependent claim, so therefore it can't expand the scope of the independent claim. It must be a kind of change in the volume. The important part is these are operations that are being done to change the characteristic of a sound that is being generated. These are not operations to stop the sound, stop generation.

THE COURT: Doesn't that stop the sound?

MS. SIMMONS: And I agree. We deposed the prosecuting attorneys and we understand that this specification and these claims were translated, and we -- there are several places in the specification that your Honor may have noticed where there's some odd language that's used.

THE COURT: Not unusual, especially in software patents.

MS. SIMMONS: Exactly. So these are some translation issues. But stop the sound, the only way that that can be construed in a way that allows the dependent claim to be valid and to not expand the scope from the

independent claim is that it has to be a subset of changing the volume, muting.

So the specification describes an operation to change the volume. It gives one example. You can reduce the volume of the generated sound, but, again, the important thing is the sound continues to be generated, and this is just an operation to effect a characteristic of the sound.

THE COURT: So you are really focused on the word "generating."

MS. SIMMONS: Yes. And the claim language is as well. It's to change a volume of the generated alert sound. It is not to stop the generation of the alerted sound, which is that could have been claimed. And there is an embodiment in the specification that describes stopping the generation of the sound, but that is contrasted with the embodiments that describe changing a volume of the generated sound. There is still a sound, and we are changing a characteristic of the sound.

THE COURT: All right. Well, I certainly understand your argument.

MS. SIMMONS: All right. Thank you, your Honor.

MR. BAUER: So I just want to make sure that the -- I think their position is that when it says to change

a volume of the sound, and your phone rings and you push the button so it goes to zero, you didn't change the volume. To them, there still has to be some sound. Going to zero, this is what the issue is. Going to zero is not changing the volume. This is their issue.

THE COURT: All right. They're saying -- you are saying going to zero changes the volume.

MR. BAUER: Is the ultimate change of volume.

THE COURT: Right. And they are saying, it isn't changing the volume because the signal has stopped.

MR. BAUER: No. There are two separate issues.

THE COURT: Two separate issues?

MR. BAUER: Two separate issues.

THE COURT: But I don't know what the difference is between stopping the generation. I thought counsel was focused on the generation of the volume, and as long as it's --

MR. BAUER: Yes. So I think there are two separate issues. I think one is going to zero is not changing the volume, because it's not the degree -- it's zero. The ultimate change, music to nothing, it didn't change the volume. You stopped it. One way or the other, you stopped it or you muted it. But their view is stopping or muting is not changing the volume. Changing the volume is going from 10 to 9 to 8 to 7, and then when you get down

to one, but when you go to zero, you've stopped it.

THE COURT: Is that the case? I just want to make sure that I do understand. Going to zero isn't a change, it's stopping?

MS. SIMMONS: No, your Honor. We completely agree that if you effect an operation that will take the volume from some level to zero, that is a change in volume. The issue is whether something completely different in operation to cease the generation of the signal itself, is that a change in volume. And, more precisely, is that an operation to change a volume? It is not. It is an operation to completely cease generation of the signal altogether.

MR. BAUER: So then the issue, your Honor, is, they're confusing the signal from the sound. Right? A sound comes out of a speaker. They are talking about the signal going into the speaker.

So it seems the way I understand it, as long as there's a signal going into the speaker, you haven't -- right. This is talking about changing the volume of the generated sound, not the generated signal. There's an electric signal that goes into the speaker and then there's a sound that comes out.

And so --

THE COURT: Well, I mean, I'm getting the

impression this is like a rheostat if I'm looking at electricity.

MR. BAUER: Right.

THE COURT: A rheostat, you turn it up, you turn it down, but you have that -- and it can look like there's no light, but you still have to click it off to stop the signal.

So if that is a correct analogy, I don't know where that puts me, but that --

MR. BAUER: But I think their view would be you have to unplug it, so there would be no electricity rather than turn it off. So as opposed to seeing nothing, that there's -- they're getting into the -- I think that's where they are at, your Honor. We'll see it in the summary judgment motion.

THE COURT: Okay.

MR. BAUER: Whether we get to the summary judgment motion.

THE COURT: All right.

MR. BAUER: But the fact is, changing the volume is changing the volume. Stopping the sound is stopping the sound. And that's what the claim talks about, right, changing the volume or stopping the sound.

The sound has nothing to do with the electrical signals. That's what we're saying. Nothing to do with the

electronics. It's what do you hear. And do you hear sound or do you hear the volume change? We say it's all about what you hear, and I think what you'll hear from them is it's about the electronics. Okay?

THE COURT: All right.

MR. BAUER: All right. Now we get to the '068. Your Honor, it's two very quick terms, I think. This is about controlling the connecting state of the calls. When you get two incoming calls, how do you deal with that? And the first term is incoming call.

What is an incoming call on your phone? Again, this is one that we had no -- we just say ordinary construction and we provided the words, what is the ordinary construction? It's a ringing or newly received call. The incoming call, when it rings, but here's the distinction between, they say the incoming call is the call when it's ringing, but the instant you accept it, it's no longer an incoming call. That's where the distinction becomes.

So that's why we say it's a ringing or newly received call. And it's in the context of the invention, which is talking about you're on the phone with the first call, in comes a second call, and you've got to make a decision. So the patent is talking about the incoming call being that second call.

So it's the ringing second call or the newly

received call. But that's the distinction. And that's what we think -- again, we thought was ordinary meaning. When the phone is ringing, you say, I have an incoming call. You pick it up and you say "hi." And you don't think it stopped being an incoming call the minute you picked it off the hook. They want it to be the call that is requesting the connection, but not yet connected.

All right. Let me show you why I think we're right. So the claim talks about this control means. This is on page 119. The control means for controlling displaying of the processing items available to the user relative to a present call.

So this is where it's distinguishing. It's a present call and an incoming call. That's what we're distinguishing between. All right. It's not the signalling or the telephone network or anything. There's a present call and an incoming call, one or the other, and in controlling the present call and the incoming call into respective connecting states corresponding to what you pick.

So you're on the call. In comes another call. You make a decision. You can merge it, put it on hold, one of those things. All right.

So that's what the claim seems to be saying to you, right, relative to a present call and incoming call.

The patent talks about if the arrival of incoming call would be displayed on the -- the user can operate the control screen. So it's talking about that arriving incoming call.

Now, page 121 is an interesting quote because this puts it in context exactly what we suggest, your Honor. Page 121 talks about in step SP8, it is detected whether the disconnect, in which the incoming call is disconnected and the call is continued.

Well, if the incoming call is disconnected, it had been connected. Right? So that's -- so it's giving you the choice. These calls come in and sometimes you merge them, sometimes you reject them. But whether the disconnect in which the incoming call is disconnected and the call with the present call is continued, is selected or not.

The patent also shows you -- this is column 7. It's an example of what happens on the telephone screen. And here in the lower part of the screen, the telephone number of the incoming call received showing that the call is in the tripartite. Tripartite means three-way phone call. Also, the lower part, call duration of the tripartite call is displayed.

In this instance it's showing you the incoming call. At least in this instance you've got two phone numbers have been connected for a second, at least, at least

in the way they're defining incoming call.

This is column 1. In a portable telephone apparatus, if a call incoming from the third party is received, the call in progress and the call newly received can be call controlled.

So the call is -- it's the newly received call as much as the ringing call. That's all we say, your Honor. And that's all. It's when it's coming in. It's not forever the incoming call, but certainly while you're making that decision, because you've got to keep it in the context of what the claim is telling you, and the claim is distinguishing the incoming call and doing things with the second call. Okay?

THE COURT: All right. Thank you.

MS. SIMMONS: Your Honor, I would like to just pick up on one of the last comments counsel just made, which brings us to one of the issues with MMI's construction with incoming call, which is, it's not forever, counsel said. It's unclear at what point an incoming call does become a connected call under MMI's construction, and, in fact, MMI's own expert, as we will show you, was unable to tell us when that might happen and instead said it's subjective, which clearly does not give us a defined boundary for what this limitation is supposed to mean.

But let's start by looking at briefly what the

'068 patent means because this will help to understand what the limitation means.

We have five asserted claims, all of which are directed at controlling calls. And as we illustrated on slide 5, we've pulled out figure 9 from the patent. The patent describes this process of controlling calls by displaying processing items on the mobile phone screen. And the patent will allow the user to scroll through these options, these processing items, and then select one of the items by stopping the scrolling while one of the items is highlighted and then determining that that is the item you want by pushing in on, for instance, a jog dial.

Now, can see in figure 9 various processing items are displayed. You're on an incoming call in the top box on figure 9 with phone number, it looks like 03 and a lot of ones. Then there's a call incoming, so we have an incoming call. And the patent discloses that various processing items will be displayed for handling that incoming call which has a phone number 06222.

The first option is activate, which is to connect the call. And it is true that the second processing item that is shown in the patent has the word "disconnect." Again, we have some language irregularities in this specification and these claims as noted before due to, we assume some translation errors. But this message actually,

this processing item may not actually be a translation error.

Disconnect, the '068 patent specifically refers to the GSM specification and indicates that it's describing a method that's implemented using the GSM specification, and disconnect is the message that is sent under the GSM specification to reject or decline an incoming call.

See the fact that it uses the word "disconnect" does not mean that the call has already been connected, which is illustrated by the fact that there is a processing item to connect the call. This is an incoming call, has not yet been connected. It's ringing, a ringing call. And as you continue to control down, the display will switch to options processing items available to the current call, the connected call.

Looking at the claim limitation, as counsel noted, the limitation requires in claim 1, requires that the processing items that are displayed are processing items relative to two different kinds of calls, an incoming call and a present call. They cannot mean the same thing.

Under Apple's construction, incoming call means a call that essentially is ringing. On this point, both sides seem to agree that a ringing call is one form of an incoming call. We say it's the only form of incoming call. But a ringing call is, as Apple has proposed, a call that is

requesting a connection with the communication terminal but has not yet been connected.

MMI adds to their construction, not only it is it a ringing call, but it's a call that is newly received. It expands the scope of an incoming call to include connected calls. And the parties have agreed under their agreed construction that present call -- you recall the claim language specifically differentiates, as counsel acknowledges, between a present call and an incoming call. Well, the parties have agreed that a present call is a call that is connected. An incoming call cannot also be a call that is connected. It is a call that is ringing. It's requesting a connection.

This specification differentiates in multiple places between an incoming call and various characterizations of connected calls, such as a predetermined call, or a call in progress, or an embodiment in which two calls exist already. However, a separate embodiment discloses displaying processing items when there's an incoming call. This is to draw a contrast between incoming calls and calls that are already rejected. I'm sorry. Already connected.

Could we switch to slide 15, please.

THE COURT: I have to say, if I were just looking at this language, it strikes me that my common sense

approach to this would be that an incoming call -- if I'm on the phone and there's an incoming call, that it doesn't change its character just because I pick up and I say, sorry. I'm on the phone with someone else. I'm disconnecting you. I mean, you are making this temporal division when I think most of us in the real world would still consider that the incoming call, not the present call.

MS. SIMMONS: Understood. The patent specification, however, does draw a clear distinction, as does the claim language, between a call that is connected and an incoming call. And part of that has to do with the fact that the invention originally claimed an embodiment in which the processing items that we talked about earlier are displayed automatically on receipt, or as the incoming call is coming in. It was described as a trigger.

So I'm on my phone and I'm talking on the phone. An incoming call is requesting a communication, a connection, it's ringing, and these processing items will be triggered and displayed automatically, which is generally what happens with phones today.

When I get a call, my phone immediately will display some call control options for me. That was what was claimed in the patent originally. During prosecution, the patentee had to limit the claims to only claim an embodiment

in which the processing items are displayed when the user pushes a button.

There was a distinct difference drawn between an incoming call, which is used as a trigger, to notify the known, I've got a call that's requesting a connection. The phone says, I'm going to help the user out by displaying these processing items so that the user can easily decide what to do with the call. And then the specification goes on to describe different kinds of processing items that can be displayed once two calls are connected. It's no longer an incoming call. It's two connected calls now.

THE COURT: That's why I love software patents. All right.

MS. SIMMONS: And one of the other issues, as I alluded to earlier, was MMI's construction that the incoming call include newly received calls is that their expert described -- we tried to get an understanding of what newly received call means. MMI's expert testified that newly received call is a, quote, "recently received call." But when asked, what does that mean, when does a call stop being recently received and now become a present call or a connected call, the expert was unable to identify when that transition occurs, because it does not make sense. The call is requesting a connection. It's ringing. It's incoming. And once it's connected, it's a connected call, a present

call.

The expert said recently a suggested perception of distance and time. A subjective definition doesn't provide us for any boundaries of what is or is not included within this scope of this claim limitation, and that's another reason why MMI's construction is not appropriate.

THE COURT: All right.

MR. BAUER: I think your Honor is right. This isn't a patent about the detailed software and the computer code and what signal is going where, the claims distinguishing between the connected call and the present call and the incoming call. It's the sequential thing. It's not a software clock cycle, did it accept it instantly or what. It's all about the incoming call.

You could, your Honor, use it, refer to it as the second call instead of the first call. And if newly received isn't clear to the jury, it's an incoming call to which something needs to be done, and to -- you know, it's clearly -- and as the expert said, we all know what newly received means. At some point, it's no longer newly received.

The last claim element, your Honor. List and listing. Again, this was one that we didn't have an original proposal. Theirs is a series, Apple's is a series of processing items displayed one after the other. And so,

you know, I don't know. One after the other. We have it processing items grouped together or grouping processing items together, the list.

The claim talks about a control means. This is on page 127. A means to display a list of processing items. And that list of processing items are things like merge the call, reject, speaker. You know, those things that you see on the front page of your phone. That's your list of processing items.

The argument I believe is a noninfringement argument that because they do it side -- well, I can go back to the picture. I believe what the argument is, that the argument is because they are grouped three by two, that's not a list. That a list has to be one above the other.

Your Honor, that might be one way, but let me just show you the patent clearly says the other way. So what is a list? Just right out of the dictionary, what's a list? A series of words or numerals. Some dictionaries might say otherwise, but what does the patent say? This should end it. Then I'm done.

On page 129, the patent says, in this case, as in the call control screen, a list in which processing for each calls are arranged in a matrix is displayed just as in the other. The patent tells you the list can be a matrix. They say a list can't be a matrix. And that's all I want

to point out. The patent tells you in its language. And, you know, we keep hearing that it's a translation issue. Well, those are the words in the patent. A list is a matrix --

THE COURT: All right.

MR. BAUER: -- in this case.

MS. SIMMONS: Looking at the claim language, again, claim 7 and 8 require that the processing items be displayed in a list, or claims 23 require listing the processing items. And as counsel noted, the key dispute here is whether a list can or cannot include a matrix. And, in fact, this is really an infringement analysis that MMI is trying to impose with their tardy construction of "grouped." MMI wants to change "list" to mean "grouped." And that would include any grouping of items regardless of order.

Apple's construction reflects that a list is a specific way of ordering the display of items. In fact, the patent specification does describe different embodiments, embodiments in which the processing items are displayed as a list, which the specification describes as from the second to fourth lines of the screen, i.e., from the top to downward. This is what we've shown on slide 22. It's a list, top to bottom.

The specification clearly differentiates between

a list and a matrix. There are embodiments that are described as, the former embodiment describes a list. Now we're going to talk about an embodiment that describes a matrix, a table.

THE COURT: So you're saying that, to some extent, the patentees have been their own lexicographers?

MS. SIMMONS: Well, I don't even know that I would say that it requires going that far. I think that the understanding of a list and a matrix are that there are two different things and the patent discloses it that way. In fact, the patentee explains the reasons for having a list versus a matrix and what the benefits of the one are and what the benefits of the other are.

So specifically the patentee described that when you have a list of options displayed for, say, two connected calls, I have to scroll down through several screens to get to all of the processing items, because they're displayed as the specification described, top to down.

Now, I might want instead as another embodiment to display the processing items for both calls, both of the connected calls as an example, side by side, and then maybe I can get, if not all, more of the processing items for both calls on the same screen.

So it even describes a reason why you would do an embodiment with a list as opposed to an embodiment with a

matrix.

And Apple's construction is also just consistent with the plain meaning of the word "list," which is a series of processing items displayed one after the other.

MMI does not cite support in the specification or the claims for changing the word "list" to mean "group." Instead, MMI cites only to a dictionary definition, the definition of which supports Apple's construction. MMI points to the etymology from this dictionary definition, which is not a proper source for us to look to in order to determine what the proper meaning of list should be in the context of these claims.

THE COURT: This is why patent litigation is so much fun. I mean, you really are talking about discrete words with a mantel of science perhaps, but all generated by business disputes. So the truth is what the Federal Circuit finds, and I mean it's amazing how we have these disputes over words that most of us wouldn't think were worthy of dispute. But there it is. Thank you very much.

MS. SIMMONS: Thank you, your Honor.

MR. BAUER: So, your Honor, all I can say, it's just the one slide she didn't put up is the one where it says a list can be arranged in a matrix. And so when we talk about lexicographer, you know, the rule says you have to be clear if you are trying to redefine things. I don't

know if they defined it here or not, but, clearly, they believed a list could include a matrix and didn't have to be one above the other as opposed to the side, although I think both is a list, but that's all.

Your Honor, that is our claim construction presentation.

THE COURT: All right. So this is the question. I really have a 2:00 o'clock deadline I have to meet, and so the question is whether we come back or whether there are just some highlights. And I'm happy to come back because -- well, because we didn't get as far as we wanted to get. But I know it's an expensive proposition. So what is the feeling among counsel here?

MR. RILEY: Your Honor, there's no way we can get through some very important motions today, and so if it would assist the Court, we would be glad to come back.

MR. BAUER: Your Honor, they're almost all their motions. I can see we don't need to argue any of them, but they are theirs. Ours are more evidentiary-type motions, which, you know, we could do those in the 20 minutes. They go hand in hand with their motions, though. If they want to argue their substance, we can just do them together.

THE COURT: Well, I guess the question is when it would be most convenient for you to come back, sooner rather than later, because we've got a lot of work to do to

get something out before the pretrial conference. And you all may have busier schedules than I do at this point because my trials have kind of disappeared.

MR. RILEY: We certainly could meet, come up with a date. I'm sure we could do it within the next couple of weeks.

THE COURT: All right. All right. Well, why don't we do that. I do think the case is dense enough that I think it would be helpful to complete the oral argument, and I apologize for being late, although maybe with another -- well, I gave you more time, so I don't think we could have gotten in it done regardless of how we did it.

MR. BAUER: Your Honor, we did pretty well for the number of slides.

THE COURT: I congratulate you all for being very efficient, and, as always, very interesting and articulate, and I appreciate it.

MR. BAUER: Your Honor, do you know your schedule or should we just deal with your clerk?

THE COURT: Well, I mean, next week I have most of Wednesday and Thursday, and then I have an oral argument in another patent case on Friday.

The following week, which is the week of the 6th, I have the Monday, Tuesday and Wednesday, and then I am out of the office for a few days. So the 6th, 7th and

8th.

And the following week, I have Thursday, the 16th. And morning would be better for me because I do have a few scattered proceedings in the afternoon.

MR. RILEY: Very good.

MR. BAUER: We'll talk, your Honor. Thank you.

THE COURT: All right. Thank you very much, counsel. Always a pleasure.

(Court recessed at 1:45 p.m.)

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